CLE: Adjudication of Capital Cases in Delaware
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ABA Guidelines for Defense Counsel in Capital Cases

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URL links to ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases on the on the website of ABA Death Penalty Representation Project

http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf

http://www.abanet.org/deathpenalty/resources/docs/Summary_of_Cases_Citing_ABA_Guidelines_2008.doc

http://www.abanet.org/deathpenalty/resources/docs/List_of%20_Cases_that_cite_to_GL_Feb_2008.doc

Death Penalty Representation Project
Special Committee of the American Bar Association

Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

In 2001 the ABA Death Penalty Representation Project sponsored a project to revise the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The original ABA Guidelines, approved in 1989, were heavily relied upon as nationally recognized standards on the defense of capital cases. The revised edition expanded the original standards to reflect recent legal developments and provided additional explanation and guidance to assist judges and capital defenders. The revised edition overwhelmingly passed in the ABA House of Delegates without dissent on February 10, 2003.

The 2003 *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*[1] are now recognized as the standard of care in the defense of death penalty cases. The ABA Guidelines are regularly cited by state and federal courts, including the U.S. Supreme Court, to assess counsel performance and ensure adequate funding and resources for the defense team effort.[2]

- In 2005, the U.S. Supreme Court reversed and remanded the case of *Rompilla v. Beard*, 545 U.S. 374, for a new sentencing hearing after finding that Rompilla's defense counsel was ineffective. The Court cited to § 10.7 of the ABA Guidelines noting: "Counsel must ... investigate prior convictions ... that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction."[3]

[1] The 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases can be found on the ABA Death Penalty Representation Project's website at http://www.abanet.org/deathpenalty/resources/home.shtml and at 31 Hofstra L.R. 913 (2003).

[2] Visit http://www.abanet.org/deathpenalty/resources/home.shtml for a continually updated list of cases that cite to the ABA Guidelines.

[3] *Rompilla v. Beard*, 545 U.S. at 387 citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.7, comment. (rev. ed. 2003).

- In 2003, the U.S. Supreme Court granted a new sentencing hearing in the case of *Wiggins v. Smith*, 539 U.S. 510 after finding that defense counsel's conduct "fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we have long referred as "guides to determining what is reasonable" and that counsel's performance fell below the Guidelines' "well-defined norms."[4]

The ABA has called on all death penalty jurisdictions to implement the Guidelines.[5] To this end, the Project speaks to state and national judicial groups, works with state legislators, and trains capital defenders about the importance of the Guidelines and how courts across the country are using them.

- In early 2008, the Nevada Supreme Court issued new standards for the defense of capital cases[6] that substantially conform to the 2003 ABA Guidelines.

- In 2006, the Arizona Supreme Court amended the Arizona Rules of Criminal Procedure to require that death penalty counsel "be guided by and familiar with" the performance standards of the ABA Guidelines.[7]

- In 2006, the Texas State Bar adopted a Texas version of the Guidelines which is almost identical to the ABA version.[8]

- In 2005, the Georgia Public Defender Standards Council adopted the ABA Guidelines (except where the Guidelines conflicted with Georgia law).[9]

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[4] *Wiggins v. Smith*, 539 U.S. 510 at 524.

[5] ABA Resolution of February 3, 1997 at http://www.abanet.org/moratorium/resolution.html.

[6] Order, ADKT No. 411, Supreme Court of Nevada, In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases.

[7] See Arizona Criminal Procedure Rule 6.8 at http://www.supreme.state.az.us/rules/rarulcrm.htm.

[8] The Guidelines and Standards for Texas Capital Counsel can be found on the Texas State Bar website or by contacting the ABA Death Penalty Representation Project.

[9] http://www.gpdsc.com/cpdsystem-standards-main.htm.

- In 2005, The Alabama Circuit Court Judges Conference adopted the ABA Guidelines by Resolution.[10]

- In 2003, the National Association of Criminal Defense Lawyers (NACDL) adopted the ABA Guidelines, noting that they are "necessary standards to ensure minimally adequate representation in capital cases."[11]

- In 2003, the Department for Public Advocacy for the Commonwealth of Kentucky adopted the performance standards of the ABA Guidelines.[12]

Please contact the ABA Death Penalty Representation Project for more information. We can be reached at 202-662-1738 or via e-mail deathpenaltyproject@staff.abanet.org. For more information about our work, please visit our website at http://www.abanet.org/deathpenalty.

[10] A copy of the resolution is available by contacting the ABA Death Penalty Representation Project.

[11] http://www.criminaljustice.org/public.nsf/0/b83fca3dcbd3063e85256da9005dd21b?OpenDocument.

[12] Attorneys assigned by the Department to a capital case are contractually obligated to meet the performance standards. A copy of the contract can be obtained by contacting the Department for Public Advocacy for the Commonwealth of Kentucky or the ABA Death Penalty Representation Project.

American Bar Association

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

Black Letter Only

Revised Edition
February 2003

The following black-letter text of the guidelines has been formally approved by the American Bar Association House of Delegates as official policy.

Introduction

This revised edition of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* is the product of a two-year long drafting effort. In April 2001, the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation jointly sponsored the ABA Death Penalty Guidelines Revision Project to update the Guidelines, which were originally adopted by the ABA House of Delegates in 1989. An Advisory Committee of experts was recruited to review and identify necessary revisions, including representatives from the following ABA and outside entities: ABA Criminal Justice Section; ABA Section of Litigation; ABA Section on Individual Rights and Responsibilities; ABA Standing Committee on Legal Aid and Indigent Defendants; ABA Special Committee on Death Penalty Representation; National Association of Criminal Defense Lawyers; National Legal Aid and Defender Association; Federal Death Penalty Resource Counsel; Habeas Assistance and Training Counsel; and State Capital Defenders Association.

Expert capital litigators were retained as consultants to the ABA Death Penalty Guidelines Revision Project to incorporate the decisions of the Advisory Committee into preliminary drafts of revisions. Drafts were considered by Advisory Committee members during several day-long meetings in Washington, D.C. as well as follow-up discussions. The final working draft of the revisions was approved by the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation. The ABA House of Delegates approved the revised edition of the Guidelines on February 10, 2003.

Acknowledgements

The American Bar Association gratefully acknowledges the assistance of the members of the Advisory Committee and others who contributed valuable insight and expertise to this endeavor: Barry Alberts, private practitioner, Schiff Hardin & Waite, Chicago, Illinois (Representative from ABA Section of Litigation); Sylvia Bacon, Judge (Retired), Superior Court of the District of Columbia, Washington, D.C. (Representative from ABA Criminal Justice Section); Stephen B. Bright, Director, Southern Center for Human Rights, Atlanta, Georgia (Representative from National Association of Criminal Defense Lawyers); David I. Bruck, private practitioner, Columbia, South Carolina (Representative from Federal Death Penalty Resource Counsel); Mardi Crawford, Staff Attorney, New York State Defenders Association, Albany, New York; Lawrence J. Fox, private practitioner, Drinker Biddle & Reath LLP, Philadelphia, Pennsylvania (Chair, ABA Special Committee on Death Penalty Representation); Stephen K. Harper, Co-coordinator, Capital Litigation Unit, Miami-Dade County Public Defender's Office, Miami, Florida (Representative from National Legal Aid and Defender Association); Randy Hertz, Professor of Law, New York University School of Law, New York, New York; Henderson Hill, private practitioner, Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, P.A., Charlotte, North Carolina (Representative from ABA Special Committee on Death Penalty Representation); Denise LeBoeuf, Director, Capital Post-conviction Project of Louisiana, New Orleans, Louisiana; Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis, Indiana; Margaret Love, of counsel, Asbill Moffitt & Boss, Chartered, Washington, D.C.; Jill Miller, Forensic Social Worker, Madison, Wisconsin; L. Jonathan Ross, private practitioner, Wiggin & Nourie, P.A., Manchester, New Hampshire (Chair, ABA Standing Committee on Legal Aid and Indigent Defendants); Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York; Randolph Stone, Professor of Law, University of Chicago School of Law, Chicago, Illinois (Representative from ABA Standing Committee on Legal Aid and Indigent Defendants); Ronald J. Tabak, private practitioner, Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York (Representative from ABA Section of Individual Rights and Responsibilities); Scott Wallace, Director, Defender Legal Services, National Legal Aid and Defender Association, Washington, D.C.; and Denise Young, private practitioner, Tucson, Arizona (Representative from Habeas Assistance and Training Project).

The following ABA staff and ABA entities participated in this project: Terry Brooks; Rebecca Coffee; Shubhangi Deoras; Judith Gallant; Robin Maher; Melanie Mays; Elisabeth Semel; the Association of the Bar of the City of New York; Criminal Justice Section; the Special Committee on Death Penalty Representation; the Section of Individual Rights and Responsibilities; the Standing Committee on Legal Aid and Indigent Defendants; the Section of Litigation; and the Senior Lawyers Division.

Finally, the ABA thanks Raoul Schonemann, Chris Spaulding, and Janice Bergmann, who served as consultants to this project, and expresses its special appreciation to the Reporter, Eric M. Freedman, Professor of Law, Hofstra University School of Law, Hempstead, New York.

TABLE OF CONTENTS

Definitional Notes

Throughout these Guidelines:

1. As in the first edition, "should" is used as a mandatory term.

2. By "jurisdiction" is meant the government under whose legal authority the death sentence is to be imposed. Most commonly, this will be a state (as opposed to, *e.g.*, a county) or the federal government as a whole. The term also includes the military and any other relevant unit of government (*e.g.*, Commonwealth, Territory). Where a federal judicial district or circuit is meant, the Commentary will so state.

3. The terms "counsel," "attorney," and "lawyer" apply to all attorneys, whether appointed, retained, acting *pro bono*, or employed by any defender organization (*e.g.*, federal or state public defenders offices, resource centers), who act on behalf of the defendant in a capital case. When modified by "private," these terms apply to both *pro bono* and retained attorneys.

4. The term "custody" is used in the inclusive sense of *Hensley v. Municipal Court*, 411 U.S. 345, 350-51 (1973).

5. The term "post-conviction" is a general one, including (a) all stages of direct appeal within the jurisdiction and certiorari (b) all stages of state collateral review proceedings (however denominated under state law) and certiorari, (c) all stages of federal collateral review proceedings, however denominated (ordinarily petitions for writs of habeas corpus or motions pursuant to 28 U.S.C. § 255, but including all applications of similar purport, *e.g.*, for writ of error coram nobis), and including all applications for action by the Courts of Appeals or the United States Supreme Court (commonly certiorari, but also, *e.g.*, applications for original writs of habeas corpus, applications for certificates of probable cause), all applications

for interlocutory relief (*e.g.*, stay of execution, appointment of counsel) in connection with any of the foregoing. If a particular subcategory of post-conviction proceeding is meant, the language of the relevant Guideline or Commentary will so state.

6. The terms "defendant," "petitioner," "inmate," "accused" and "client" are used interchangeably.

7. The terms "capital case" and "death penalty case" are used interchangeably.

8. The terms "defender organization," "Independent Authority," and "Responsible Agency" are defined in Guideline 3.1 and accompanying Commentary

9. The term "Legal Representation Plan" is defined in Guideline 2.1.

GUIDELINE 1.1 – OBJECTIVE AND SCOPE OF GUIDELINES

A. **The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.**

B. **These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation.**

GUIDELINE 2.1 – ADOPTION AND IMPLEMENTATION OF A PLAN TO PROVIDE HIGH QUALITY LEGAL REPRESENTATION IN DEATH PENALTY CASES

A. **Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines (the "Legal Representation Plan").**

B. **The Legal Representation Plan should set forth how the jurisdiction will conform to each of these Guidelines.**

C. **All elements of the Legal Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.**

GUIDELINE 3.1 – DESIGNATION OF A RESPONSIBLE AGENCY

A. The Legal Representation Plan should designate one or more agencies to be responsible, in accordance with the standards provided in these Guidelines (the "Responsible Agency") for:

1. ensuring that each capital defendant in the jurisdiction receives high quality legal representation, and

2. performing all the duties listed in Subsection E.

B. The Responsible Agency should be independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.

C. The Responsible Agency for each stage of the proceeding in a particular case should be one of the following:

Defender Organization

1. A "defender organization," that is, either:

a. a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

b. a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

Independent Authority

2. An "Independent Authority," that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

D. Conflict of Interest:

1. In any circumstance in which the performance by a defender organization of a duty listed in Subsection E would result in a conflict of interest, the relevant duty should be performed by the Independent Authority. The jurisdiction should implement an effectual system to identify and resolve such conflicts.

2. When the Independent Authority is the Responsible Agency, attorneys who hold formal roles in the Independent Authority should be ineligible to represent defendants in capital cases within the jurisdiction during their term of service.

E. The Responsible Agency should, in accordance with the provisions of these Guidelines, perform the following duties:

1. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

2. draft and periodically publish rosters of certified attorneys;

3. draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

4. assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

5. monitor the performance of all attorneys providing representation in capital proceedings;

6. periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;

7. conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and

8. investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

GUIDELINE 4.1 – THE DEFENSE TEAM AND SUPPORTING SERVICES

A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.

1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.

2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

1. Counsel should have the right to have such services provided by persons independent of the government.

2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

GUIDELINE 5.1 – QUALIFICATIONS OF DEFENSE COUNSEL

A. The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

B. In formulating qualification standards, the Responsible Agency should insure:

1. That every attorney representing a capital defendant has:

a. obtained a license or permission to practice in the jurisdiction;

b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and

c. satisfied the training requirements set forth in Guideline 8.1.

2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:

a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

b. skill in the management and conduct of complex negotiations and litigation;

c. skill in legal research, analysis, and the drafting of litigation documents;

d. skill in oral advocacy;

e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

GUIDELINE 6.1 – WORKLOAD

The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.

GUIDELINE 7.1 – MONITORING; REMOVAL

A. **The Responsible Agency should monitor the performance of all defense counsel to ensure that the client is receiving high quality legal representation. Where there is evidence that an attorney is not providing high quality legal representation, the Responsible Agency should take appropriate action to protect the interests of the attorney's current and potential clients.**

B. **The Responsible Agency should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high quality legal representation.**

C. **The Responsible Agency should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high quality legal representation. Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high quality legal representation, the office should not receive additional appointments.**

D. **Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the Responsible Agency should provide written notice that such action is being contemplated, and give the attorney or defender office opportunity to respond in writing.**

E. **An attorney or defender office sanctioned pursuant to this Guideline should be restored to the roster only in exceptional circumstances.**

F. **The Responsible Agency should ensure that this Guideline is implemented consistently with Guideline 2.1(C), so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this Guideline.**

GUIDELINE 8.1 – TRAINING

A. **The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.**

B. **Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:**

1. **relevant state, federal, and international law;**
2. **pleading and motion practice;**
3. **pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
4. **jury selection;**
5. **trial preparation and presentation, including the use of experts;**
6. **ethical considerations particular to capital defense representation;**
7. **preservation of the record and of issues for post-conviction review;**
8. **counsel's relationship with the client and his family;**
9. **post-conviction litigation in state and federal courts;**
10. **the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;**
11. **the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.**

C. **Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.**

D. The Legal Representation Plan should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

GUIDELINE 9.1 – FUNDING AND COMPENSATION

A. **The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.**

B. **Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.**

1. **Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**

2. **Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.**

3. **Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

C. **Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**

1. **Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.**

2. **Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**

3. **Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for**

services performed in or out of court. Periodic billing and payment should be available.

D. Additional compensation should be provided in unusually protracted or extraordinary cases.

E. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

GUIDELINE 10.1 – ESTABLISHMENT OF PERFORMANCE STANDARDS

A. The Responsible Agency should establish standards of performance for all counsel in death penalty cases.

B. The standards of performance should be formulated so as to insure that all counsel provide high quality legal representation in capital cases in accordance with these Guidelines. The Responsible Agency should refer to the standards when assessing the qualifications or performance of counsel.

C. The standards of performance should include, but not be limited to, the specific standards set out in these Guidelines.

GUIDELINE 10.2 – APPLICABILITY OF PERFORMANCE STANDARDS

Counsel should provide high quality legal representation in accordance with these Guidelines for so long as the jurisdiction is legally entitled to seek the death penalty.

GUIDELINE 10.3 – OBLIGATIONS OF COUNSEL RESPECTING WORKLOAD

Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these Guidelines.

GUIDELINE 10.4 – THE DEFENSE TEAM

A. **When it is responsible for designating counsel to defend a capital case, the Responsible Agency should designate a lead counsel and one or more associate counsel. The Responsible Agency should ordinarily solicit the views of lead counsel before designating associate counsel.**

B. **Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.**

1. **Subject to the foregoing, lead counsel may delegate to other members of the defense team duties imposed by these Guidelines, unless:**

a. **The Guideline specifically imposes the duty on "lead counsel," or**

b. **The Guideline specifically imposes the duty on "all counsel" or "all members of the defense team."**

C. **As soon as possible after designation, lead counsel should assemble a defense team by:**

1. **Consulting with the Responsible Agency regarding the number and identity of the associate counsel;**

2. **Subject to standards of the Responsible Agency that are in accord with these Guidelines and in consultation with associate counsel to the extent practicable, selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:**

a. **at least one mitigation specialist and one fact investigator;**

b. **at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;**

c. **any other members needed to provide high quality legal representation.**

D. **Counsel at all stages should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.**

GUIDELINE 10.5 – RELATIONSHIP WITH THE CLIENT

A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.

B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.

2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.

3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.

C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;

2. current or potential legal issues;

3. the development of a defense theory;

4. presentation of the defense case;

5. potential agreed-upon dispositions of the case;

6. litigation deadlines and the projected schedule of case-related events; and

7. relevant aspects of the client's relationship with correctional, parole, or other governmental agents (*e.g.*, prison medical providers or state psychiatrists).

GUIDELINE 10.6 – ADDITIONAL OBLIGATIONS OF COUNSEL REPRESENTING A FOREIGN NATIONAL

A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.

B. Unless predecessor counsel has already done so, counsel representing a foreign national should:

1. immediately advise the client of his or her right to communicate with the relevant consular office; and

2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.

a. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.

GUIDELINE 10.7 – INVESTIGATION

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

B. 1. All post-conviction counsel have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

GUIDELINE 10.8 – THE DUTY TO ASSERT LEGAL CLAIMS

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:

1. consider all legal claims potentially available; and

2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and

3. evaluate each potential claim in light of:

a. the unique characteristics of death penalty law and practice; and

b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and

c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and

d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.

C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:

1. asserting legal claims whose basis has only recently become known or available to counsel; and

2. supplementing claims previously made with additional factual or legal information.

GUIDELINE 10.9.1 – THE DUTY TO SEEK AN AGREED-UPON DISPOSITION

A. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.

B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;

2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;

3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing Guidelines or mandatory sentencing requirements;

4. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;

5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;

6. whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;

7. the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;

8. concessions that the client might offer, such as:

a. an agreement to proceed waive trial and to plead guilty to particular charges;

b. an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;

c. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;

d. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;

e. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;

f. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;

g. an agreement with the victim's family, which may include matters such as: a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;

h. agreements such as those described in Subsections 8 (a)-(h) respecting actual or potential charges in another jurisdiction;

9. benefits the client might obtain from a negotiated settlement, including:

a. a guarantee that the death penalty will not be imposed;

b. an agreement that the defendant will receive a specified sentence;

c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;

d. an agreement that one or more of multiple charges will be reduced or dismissed;

e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;

f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;

g. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement;

h. agreements such as those described in Subsections 9(a)-(h) respecting actual or potential charges in another jurisdiction.

C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.

D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.

E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.

F. Counsel should not accept any agreed-upon disposition without the client's express authorization.

G. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

GUIDELINE 10.9.2 – ENTRY OF A PLEA OF GUILTY

A. The informed decision whether to enter a plea of guilty lies with the client.

B. In the event the client determines to enter a plea of guilty:

1. Prior to the entry of the plea, counsel should:

a. make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;

b. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea;

c. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court and providing a statement concerning the offense.

2. During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

GUIDELINE 10.10.1 – TRIAL PREPARATION OVERALL

As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

GUIDELINE 10.10.2 – VOIR DIRE AND JURY SELECTION

A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis or race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.

B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

C. Counsel should consider seeking expert assistance in the jury selection process.

GUIDELINE 10.11 – THE DEFENSE CASE CONCERNING PENALTY

A. **As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.**

B. **Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.**

C. **Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.**

D. **Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.**

E. **Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.**

F. **In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:**

1. **Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;**

2. **Expert and lay witnesses along with supporting documentation (*e.g.* school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;**

3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

4. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.

5. Demonstrative evidence, such as photos, videos, and physical objects (*e.g.*, trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.

G. In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (*e.g.*, motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.

H. Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.

I. Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.

J. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

1. carefully consider

a. what legal challenges may appropriately be made to the interview or the conditions surrounding it, and

b. the legal and strategic issues implicated by the client's co-operation or non-cooperation;

2. insure that the client understands the significance of any statements made during such an interview ; and

3. attend the interview.

K. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

L. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

GUIDELINE 10.12 – THE OFFICIAL PRESENTENCE REPORT

A. If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:

1. where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;

2. provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it.

3. review the completed report;

4. take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report;

5. take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate or misleading.

GUIDELINE 10.13 – THE DUTY TO FACILITATE THE WORK OF SUCCESSOR COUNSEL

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;

B. providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;

C. sharing potential further areas of legal and factual research with successor counsel; and

D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

GUIDELINE 10.14 – DUTIES OF TRIAL COUNSEL AFTER CONVICTION

A. Trial counsel should be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence.

B. Trial counsel should take whatever action(s), such as filing a notice of appeal, and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief.

C. Trial counsel should not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Guideline 10.15 applies in its entirety.

D. Trial counsel should take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

GUIDELINE 10.15.1 – DUTIES OF POST-CONVICTION COUNSEL

A. Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.

B. If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.

C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

D. The duties of the counsel representing the client on direct appeal should include filing a petition for *certiorari* in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency.

E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:

1. maintain close contact with the client regarding litigation developments; and

2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;

3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and

4. continue an aggressive investigation of all aspects of the case.

GUIDELINE 10.15.2 – DUTIES OF CLEMENCY COUNSEL

A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.

B. Clemency counsel should conduct an investigation in accordance with Guideline 10.7.

C. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.

D. Clemency counsel should ensure that the process governing consideration of the client's application is substantively and procedurally just, and, if not should seek appropriate redress.

Cases that cite to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

United States Supreme Court

1. Rompilla v. Beard, 545 U.S. 374 (2005).

2. Florida v. Nixon, 543 U.S. 175 (2004).

3. Wiggins v. Smith, 539 U.S. 510 (2003).

Other Federal Cases

4. Saranchak v. Beard, 2008 WL 80411 (M.D. Pa. Jan. 2008).

5. Moore v. Mitchell, No. 1:00-CV-023, 2008 U.S. Dist. LEXIS 7401 (S.D. Ohio Jan. 2008).

6. Fauntenberry v. Mitchell, 2008 U.S. App. LEXIS 1435 (6th Cir. Jan. 2008) (Moore, K., dissenting).

7. Meyer v. Branker, 2007 U.S. App. LEXIS 26335 (4th Cir. Nov. 13, 2007).

8. Loden v. Mississippi, 2007 Miss. LEXIS 558 (Oct. 4, 2007).

9. Leavitt v. Arave, 2007 U.S. Dist. LEXIS 72906

10. Jackson v. Bradshaw, 2007 U.S. Dist. LEXIS 75523 (S.D. OH September 28, 2007).

11. Taylor v. Horn, 2007 U.S. App. LEXIS 22448 (Sept. 20, 2007).

12. Clark v. Quarterman 2007 U.S. Dist. LEXIS 68249 (E.D. Tex. Sept. 14, 2007)

13. Murphy v. Sirmons, 497 F. Supp. 2d 1257 (E.D. OK. Aug. 1, 2007)

14. Haliym v. Mitchell, 2007 FED App. 0262P (6th Cir. Jul.13, 2007).

15. Hartman v. Bagley, 492 F.3d 347 (6th Cir. Jul. 10, 2007).

16. Prevatte v. Baker, 499 F. Supp. 2d 1324 (N.D. Ga. July 4, 2007).

17. Diaz v. Quarterman, No. 05-70057, 2007 U.S. App. LEXIS 15855 (5th Cir. Jul. 3, 2007).

18. Morris v. Beard, Civil Action No. 01-3070 (E.D. Pa. Jun. 20, 2007).

19. Stevens v. McBride, 489 F.3d 883 (7th Cir. 2007).

20. Jefferson v. Terry, 490 F. Supp.2d 1261 (N.D.Ga. 2007).

21. Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007).

22. Outten v. Kearney, 464 F.3d 401 (3d Cir. 2006).

23. Dickerson v. Bagley, 453 F.3d 690 (6th Cir. 2006).

24. Hedrick v. True, 443 F.3d 342 (4th Cir. 2006).

25. Lundgren v. Mitchell, 440 F. 3d 754 (6th Cir. 2006).

26. Martinez v. Dretke, No. Civ.A. G-02-718, 2006 WL 305666 (S.D. Tex. Feb. 7, 2006), rev'd, Martinez v. Quarterman, 481 F.3d 249 (5th Cir. 2007)

27. Summerlin v. Schriro, 427 F. 3d 623 (9th Cir. 2005).

28. Clark v. Mitchell, 425 F.3d 270 (6th Cir. 2005).

29. Moore v. Parker, 425 F.3d 250 (6th Cir. 2005).

30. United States v. Kreutzer, 61 M.J. 293 (C.A.A.F. 2005).

31. Harries v. Bell, 417 F. 3d 631 (6th Cir. 2005).

32. Earp v. Ornoski, 431 F. 3d 1158 (9th Cir. 2005).

33. Smith v. Dretke, 422 F. 3d 269 (5th Cir. 2005).

34. Woodard v. Mitchell, No. 1:98CV1403, 2005 U.S. Dist. LEXIS 22109 (N.D. Ohio Sep. 30, 2005).

35. Mason v. Mitchell, 396 F.Supp.2d 837 (N.D. Ohio Oct. 31, 2005).

36. Crowe v. Terry, 426 F.Supp.2d 1310 (N.D. Ga. 2005).

37. Mitts v. Bagley, No. 1:03CV1131, 2005 WL 2416929 (N.D. Ohio Sept.29, 2005).

38. Thomas v. Beard, 388 F.Supp.2d 489 (E.D. Pa. 2005).

39. United States v. Karake, 370 F.Supp.2d 275 (D.D.C. 2005).

40. Stitt v. United States, 369 F.Supp.2d 679 (E.D. Va. 2005), rev'd on other grounds, 475 F.Supp.2d. 571 (2007).

41. Canaan v. McBride, 395 F.3d 376 (7th Cir. 2005).

42. Allen v. Woodford, 395 F.3d 979 (9th Cir. 2005), amending Allen v. Woodford, 366 F.3d 823 (9th Cir. 2004).

43. Kandies v. Polk, 385 F.3d 457 (4th Cir. 2004).

44. Hartman v. Bagley, 333 F. Supp. 2d 632 (N.D. Ohio 2004).

45. Lovitt v. True, 330 F.Supp.2d 603 (E.D. Va. 2004).

46. Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004).

47. Davis v. Woodford, 384 F.3d 628 (9th Cir. 2004) (dissent).

48. Cone v. Bell, 359 F.3d 785 (6th Cir. 2004) (concurring opinion), rev'd, Bell v. Cone, 543 U.S. 447 (2005).

49. Rompilla v. Horn, 355 F.3d 233 (3rd Cir. 2004) (dissent).

50. Rompilla v. Horn, 359 F.3d 310 (3rd Cir. 2004)

51. Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003).

52. Longworth v. Ozmint, 302 F. Supp. 2d 535 (D.S.C. 2003).

53. Bryan v. Mullin, 335 F.3d 1207 (10th Cir. 2003) (concurring in part and dissenting in part).

54. United States v. Suarez, 233 F.Supp.2d 269 (D.P.R. 2002).

55. United States v. Miranda, 148 F.Supp.2d 292 (S.D.N.Y. 2001).

56. United States v. Murphy, 50 M.J. 4 (C.A.A.F. 1998).

57. Crandell v. Bunnell, 144 F.3d 1213 (9th Cir. 1998), overruled by Schell v. Witek, 218 F. 3d 1017 (2000).

58. Brecheen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994).

State Cases

59. State of Florida v. Kilgore, 2007 Fla. LEXIS 2201 (Nov. 21, 2007).

60. Ex Parte Van Alstyne, 2007 Tex. Crim. App. LEXIS (Nov. 14, 2007).

61. Jones v. Alabama, 2007 Ala. Crim. App. LEXIS 156 (Ala. Aug. 31, 2007).

62. State v. Andriano, 161 P.3d 540 (Ariz. July 2007).

63. State v. Garza, No. CR-04-0343-AP, 2007 Ariz. LEXIS 68 (Ariz. Jun. 29, 2007).

64. State v. Morris, 160 P.3d 203 (2007);No. CR-05-0267-AP, 2007 Ariz. LEXIS 65, (Ariz. Jun. 18, 2007).

65. Saldano v. Texas, 232 S.W.3d 77 (Tex. Crim. App. June 6, 2007).

66. Dunlap v. People, 173 P.3d 1054 (Colo. May 2007).

67. Ard v. Catoe, 372 S.C. 318 (S.C. Mar. 2007).

68. Commonwealth v. Spotz, 896 A.2d 1191 (Pa. 2006).

69. Kilgore v. State, 933 So. 2d. 1192 (Fla. Dist. Ct. App. 2006).

70. Henry v. State, 937 So. 2d. 563 (Fla. 2006).

71. Menzies v. Galetka, 150 P.3d 380 (Utah 2006).

72. Davis v. State, No. CC-93-534, 2006 WL 510508 (Ala.Crim.App. Mar. 3, 2006), abrogated by Ex parte Clemons, No. 1041915, 2007 WL 1300722 (Ala. May 04, 2007)

73. Torres v. State, 120 P. 3d 1184 (Okla. Crim. App. 2005).

74. Commonwealth v. Hall, 872 A.2d 1177 (Pa. 2005).

75. Commonwealth v. Brown, 872 A.2d 1139 (Pa. 2005).

76. Presley v. State, 2005 Ala. Crim. App. LEXIS 52 (Feb. 25, 2005).

77. Commonwealth v. Williams, 863 A. 2d 505 (Pa. 2004).

78. Harris v. State, 947 So. 2d. 1079 (Ala. Crim. App. 2004), rev'd on other grounds, Ex Parte Jenkins, 2005 Ala. LEXIS 49 (Ala. Apr. 8, 2005).

79. In re Larry Douglas Lucas, 94 P.3d 477 (Cal. 2004).

80. Franks v. State, 278 Ga. 246, 599 S.E.2d 134 (Ga. 2004).

81. Peterka v. State, 890 So.2d 219 (Fla. 2004).

82. Armstrong v. State, 862 So.2d 705 (Fla. 2003).

83. Zebroski v. State, 822 A.2d 1038 (Del. 2003).

Cases citing to the ABA Guidelines for the Appointment and Performance of Defense Counsel In Capital Cases (1989 and 2003 versions)

U.S. SUPREME COURT

Rompilla v. Beard, 545 U.S. 374 (2005).
The Supreme Court overturned the Third Circuit's decision in *Rompilla v. Horn***,** 355 F.3d 233 (3d Cir. 2004) and found the Pennsylvania Supreme Court's failure to find defense counsel ineffective objectively unreasonable. Specifically, the Court held that counsel was required to review the record of the defendant's previous conviction when they had been put on notice by the prosecution that the prior record was going to be introduced as aggravating evidence during sentencing. *Rompilla*, 545 U.S. at 377

In discussing the obligations of defense counsel as they were understood at the time of Rompilla's trial, the opinion emphasizes that counsel is required to review material that the state will use against the defendant, *id.* at 375, and discusses the ABA Guidelines in detail:

> In 1989, shortly after Rompilla's trial, the ABA promulgated a set of guidelines specifically devoted to setting forth the obligations of defense counsel in death penalty cases. Those Guidelines applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed a similarly forceful directive: "Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. "Guideline 11.4.1.D.4. When the United States argues that Rompilla's defense counsel complied with these Guidelines, it focuses its attentions on a different Guideline, 11.4.1.D.2. Brief for United States as *Amicus Curiae* 20-21. Guideline 11.4.1.D.2 concerns practices for working with the defendant and potential witnesses, and the United States contends that it imposes no requirement to obtain any one particular type of record or information. *Id.* But this argument ignores the subsequent Guideline quoted above, which is in fact reprinted in the appendix to the United States' brief, that requires counsel to " 'make efforts to secure information in the possession of the prosecution or law enforcement authorities.' "
>
> Later, and current, ABA Guidelines relating to death penalty defense are even more explicit:
>
> "Counsel must ... investigate prior convictions ... that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction."
>
> Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines. 539 U.S. at 524 ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor' ". For reasons given in the

> text, no such further investigation was needed to point to the reasonable duty to look in the file in question here

Rompilla, 545 U.S. at 387, n.7.

Florida v. Nixon, 543 U.S. 175 (2004).
The Supreme Court held that trial counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance ineffective. The Court noted that counsel's effectiveness must be evaluated under *Strickland v. Washington's* standard: whether "counsel's representation 'fell below an objective standard of reasonableness'." 543 U.S. at 178, citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Justice Ginsburg's decision notes that, under the facts of this particular case, "the gravity of the potential sentence in a capital trial and the proceeding's two phase structure vitally affect counsel's strategic calculus…. In such cases, 'avoiding execution [may be] the best and only realistic result possible." *Nixon,* 543 U.S. at 191 (citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 10.9.1, Commentary). The Court further cites the Guidelines to support the premise that "pleading guilty without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant." *Id*. at 191 n.6.

Wiggins v. Smith, 539 U.S. 510, (2003).
The Supreme Court granted a new sentencing hearing after holding that trial counsel's failure to fully investigate Wiggins' background constituted ineffective assistance of counsel. Counsel failed to present evidence of several physical and sexual abuse Wiggins experienced at the hand of his mother and a series of foster parents. Wiggins' mother, a chronic alcoholic, frequently left Wiggins and his siblings at home alone without any food or money, forcing them to beg for food and to eat paint chips and garbage. She once forced Wiggins to put his hand up against a hot stove burner, which led to his hospitalization. The father in Wiggins' second foster home repeatedly molested and raped him. At age 16, Wiggins ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. Trial counsel failed to conduct a mitigation investigation and social history, and none of this information was presented at the penalty phase of trial.

The Supreme Court noted that:

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra,* at 688, 466 U.S. 668; *Williams v. Taylor, supra,* at 396, 529 U.S. 362. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. *Cf. id.,* 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history,*

prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added).

Id. at 524.

FEDERAL COURTS

Saranchak v. Beard, No. 1:CV-05-0317, 2008 WL 80411 (M.D. Pa. January 4, 2008). On appeal to the United States District Court for the Middle District of Pennsylvania, Saranchak claimed his counsel's failure to investigate mental health evidence in support of a diminished capacity defense qualified as deficient performance under *Strickland* to warrant habeus relief.

Analyzing under *Strickland,* the court examined counsel's failure to provide the licensed clinical psychologist with medical records of Saranchak's mental health and alcohol abuse , where absent those records the psychologist concluded that Saranchak's impairments did not substantially diminish his capacity to formulate the specific intent to kill; counsel's failure to gather school and mental health records detailing Saranchak's history of mental health problems; and counsel's failure to submit additional witness testimony that could have testified to Saranchak's history of alcohol abuse:

> In the context of ineffective assistance based on counsel's failure to investigate, the court must determine whether counsel exercised "reasonable professional judgment." *Wiggins,* 539 U.S. at 522-23. One source for determining the prevailing professional norms is found in the American Bar Association standards for criminal justice. [28] *See Strickland,* 466 U.S. at 688 (recognizing that the ABA standards are "guides to determining what is reasonable").

2008 WL 80411 at *18. Based on this evidence the court found that Saranchak satisfied the first prong of *Strickland*. "Counsel's disregard for conspicuous pieces of evidence that pointed to a potentially successful defense cannot be described as anything short of deficient representation." Id. at * 21.

Moore v. Mitchell, No. 1:00-CV-023, 2008 U.S. Dist. LEXIS 7401 (S.D. Ohio Jan. 18, 2008). Moore appealed to the District Court for the Southern District of Ohio a supplemental petition for writ of habeas corpus. Among Moore's twenty-five claims for relief, the District Court analyzed whether trial counsel rendered ineffective assistance of counsel. Moore claimed trial counsel employed a mitigation specialist who failed to discuss substantive mitigation issues with Moore and failed to adequately assist in the preparation of the mitigation phase. Id. at *33.

In the Report and Recommendations of the District Court, the Chief Judge Magistrate addressed this issue and stated, "neither the Constitution nor the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) ("ABA Death Penalty Guidelines") guarantee or mandate the right to an "effective mitigation specialist." Id. at *35. Moore appealed this finding citing to ABA Guidelines 4.1(A)(1) ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist."); and Guideline 10.4(C)(2) (requiring lead attorneys to retain a mitigation specialist as soon a possible after being designated as counsel). Id. The District Court ultimately found that although trial counsel may have been ". . . deficient in failing

to obtain the services of an effective mitigation specialist, the subclaim would nonetheless fail…" Id. Moore failed to establish prejudice under the *Strickland* standard and was therefore unsuccessful on this claim.

Fauntenberry v. Mitchell, 2008 U.S. App. LEXIS 1435 (6th Cir. Jan. 25, 2008) (Moore, K., dissenting).
The Sixth Circuit affirmed the Southern District of Ohio's denial of Fauntenberry's petition for writ of habeas corpus. Although Fauntenberry's trial counsel failed to present significant mitigating evidence pertaining to Fauntenberry's potential brain damage and failed to properly utilize the defense expert witness, the Sixth Circuit found that defense counsel's actions did not constitute ineffective assistance of counsel.

In the dissenting opinion, Judge Moore wrote that she did not agree with the majority's conclusion that Fauntenberry had failed to establish ineffective assistance of counsel. Judge Moore opined that although a "reasonable diligent attorney" may conclude when further investigation would be a waste, it is the attorney's "constitutional duty" to thoroughly investigate the defendant's background. Id. at **23. Judge Moore also noted that the fact that the defendant can be sentenced to death "magnifies counsel's responsibility to investigate." *Id.*; GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.7 Commentary (Am. Bar Ass'n, Rev. Ed. 2003) ("2003 GUIDELINES")." Id.

The State argued that Fauntenberry's refusal to cooperate with defense attorneys and the defense expert witness precludes his claim that he received ineffective representation. Id. at **27. Citing to section 10.7(A)(2) of the ABA Guidelines, Judge Moore identified that the Guidelines "specifically state that mitigating evidence must be pursued "regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." Id. at **27-8. The fact that Fauntenberry did not make investigation easy for counsel, does not excuse counsel from failing to investigate mitigating evidence. Judge Moore wrote:

> . . . the ABA demands that defense counsel go beyond the barriers that their client may erect. The ABA even recognizes that when pursuing mitigating evidence, "[o]btaining such information typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client may suffer." 2003 GUIDELINES, 10.7 commentary. While the ABA recognizes the challenges that defense counsel may face and exhorts counsel to continue pursuing mitigating evidence in the face of those challenges, the majority condones a half-hearted effort.

Id. at **28. Judge Moore found defense counsel had significant "red flags" to fully investigate Fauntenberry's medical history and because they failed to do so, she dissented.

Meyer v. Branker, 506 F. 3d 358 (4th Cir. Nov. 13, 2007).
Petitioner challenged his capital sentence raising claims relating to the effectiveness of his counsel. Specifically, Petitioner contended that the failure of his sentencing attorney to present mental health mitigation testimony constituted ineffective assistance of counsel. The lower court cited to the ABA guidelines, noting that mental health evidence is extremely important to capital sentencing juries and defense counsel therefore "should consider" including it at trial. ABA Guideline 10.11.F.2. Based upon this, Petitioner argued that reasonably competent attorney

performance demands the presentment of available mental health mitigation evidence at trial, absent some "weighty tactical advantage" to be gained by its withholding. Since no such "weighty advantage" was present in this case, petitioner concluded that counsel's failure to present mental health mitigation testimony constituted ineffective assistance of counsel.

The court rejected this argument, holding that Petitioner was unable to satisfy either the "performance" or the "prejudice" prong of the Supreme Court's Strickland test. *Strickland v. Washington,* 466 U.S. 668 (1984). In addition, the court noted that although the ABA guidelines, which emphasize the importance of mental health mitigation evidence, may be of some relevance in determining what constitutes reasonable performance in a capital trial, they certainly cannot be dispositive in and of themselves, *See* Rompilla v. Beard, 545 U.S. 374 (2005). No *per se* rule requires the presentment of such evidence at trial.

Loden v. Mississippi, 2007 Miss. Lexis 558 (Oct. 4, 2007).
Petitioner, during his appeal from a capital murder conviction and death sentence in the Supreme Court of Mississippi, contended that he was improperly denied funds to retain the assistance of a forensic social worker to investigate and present relevant mitigating factors. Petitioner filed an "Ex Parte Motion for Funds for Expert Assistance in the Field of Mitigation Investigation." The motion sought the services of a forensic social worker to assist counsel with interviews, preparation of mitigation witnesses and in general. To adequately develop the full range of mitigation circumstances that existed in this case. The lower court denied Petitioner's motion stating that the forensic social worker would only repeat work of the investigator, the attorneys or psychiatrists.

However, Petitioner asserted that the forensic social worker would have uncovered substantial mitigation evidence and the denial of funds violated the *Sixth*, *Eighth*, and *Fourteenth Amendments.* Petitioner supported his argument by citing to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

In spite of Petitioner's argument, the Supreme Court of Mississippi, citing a reference to the ABA Guidelines in *Strickland v. Washington*, 466 U.S. 668, 688 (1984), determined that while "the ABA Guidelines are guides to determining what is reasonable, they are only guides." The Court explained further that "[t]he State does not have a constitutional obligation to provide indigent defendants with the costs of expert assistance upon every demand

Leavitt v. Arave, 2007 U.S. Dist. LEXIS 72906 (Sept. 28. 2007).
Petitioner contended that his Sixth Amendment rights were violated during his trial when counsel failed to pursue an investigation of the mental condition of Petitioner, either to obtain further reports on organic brain damage or to obtain an independent psychological examination.

The Idaho District noted that although the United States Supreme Court has declined to adopt specific guidelines for adequate attorney conduct under the Sixth Amendment, it has looked to the ABA Guidelines for persuasive guidance in determining what was professionally reasonable at a particular time. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)(quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984). According to the ABA Guidelines (1989), a reasonably competent defense attorney in a capital case was expected to complete a thorough investigation of the defendant's background and social history in advance of the penalty phase, engaging in "efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduce by the prosecutor. *See* ABA Guidelines

for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (February 1989). This includes a duty to search fro evidence that might suggest the defendant is mentally impaired, a fact that has long been considered to be mitigating. *Summerlin v. Schiro*, 427 F.3d 623, 630 (9th Cir. 2005).

The court held that Petitioner has established at least a reasonable probability that, but for counsel's unprofessional errors, a sentencer would conclude that he does not deserved to be executed. Because Petitioner has proven a Sixth Amendment violation, the court shall grant relief from the sentence of death.

Jackson v. Bradshaw, 2007 U.S. Dist. LEXIS 75523 (S.D. OH September 28, 2007).
Petitioner, a prisoner sentenced to death by the State of Ohio, filed a habeas corpus action under 28 U.S.C. § 2254. In support of his position, Petitioner argued that defense counsel failed to adequately investigate his psychological background and failed to present psychological evidence. Specifically, Petitioner contended that as a result of counsel's deficient performance, the trier of fact never heard a comprehensive evaluation of his psychological functioning. He further argued that because of counsel's deficient performance, the prosecution essentially was able to assert that Petitioner had a normal childhood when, in fact, it was fraught with domestic violence, drug abuse, and instability in his life. Petitioner explained that, under *Wiggins v. Smith,* 539 U.S. 510 (2003), prejudice from counsel's unreasonable failure to investigate and present psychological evidence is assessed by reweighing the evidence in aggravation against the totality of available mitigating evidence to determine whether there is a reasonable probability that at least one juror would have struck a different balance. Id. at 534-35, 537

The court, in response to Petitioner's argument, recognized that the American Bar Association ("ABA") Guidelines articulating standards for capital defense work--"standards to which we long have referred as 'guides to determining what is reasonable,'" *Wiggins,* 539 U.S. at 524--emphasize the importance of testimony by a psychologist or mental health expert at the mitigation phase of death penalty cases. See Clark v. Mitchell, 425 F.3d at 294 (Merritt, J., dissenting) ("the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase." (quoting Commentary to § 4.1 of the ABA Guidelines)). However, contrary to Petitioner's argument, the court concluded that counsel does not have an absolute duty to present the testimony of a psychologist at the mitigation hearing. Cf. Carter v. Mitchell, 443 F.3d 517, 527 (6th Cir. 2006) ("Counsel does not perform unreasonably merely by not ruling out every possible psychological mitigator through specialized evaluations"), *cert. denied,* 127 S.Ct. 955 (2007) (citing Lundgren v. Mitchell, 440 F.3d 754, 772 (6th Cir. 2006)).

Taylor v. Horn**,** 504 F. 3d 416 (Sept. 20, 2007).
On federal habeas review, pursuant to 28 U.S.C. § 2254, the District Court concluded that none of Petitioner's guilt or penalty-phase claims merited a writ of habeas corpus. The Court of Appeals affirmed the holding of the District Court.

Petitioner claims ineffective assistance of counsel in the penalty phase of the trial. The court noted that "counsel has an obligation to conduct a thorough investigation for mitigating evidence. *Williams v. Taylor*, 529 U.S. 362 (2000) (citing ABA Standards for Criminal Justice 4-4.1, commentary, p.4-55 (2d ed. 1980)). However, the court held that Petitioner was competent throughout the proceedings, and knowingly and voluntarily pleaded guilty and waived his trial

rights. He then unambiguously instructed his attorney not to present mitigating evidence at the penalty phase because he wanted to receive the death penalty as punishment for his crimes. Because the proceedings in the state courts afforded Petitioner an opportunity to exercise all of his Constitutional rights, and otherwise fully comported with federal law, the court denied Petitioner's claim for habeas relief.

Clark v. Quarterman, 2007 U.S. Dist. LEXIS 68249 (E.D. Tex. Sept. 14, 2007)
The District Court for the Eastern District of Texas reversed the decision of the Texas Court of Criminal Appeals, holding that petitioner did in fact show that his trial counsel was ineffective for failing to interview Petitioner's mother.

Petitioner, an inmate convicted of capital murder and sentenced to death, filed a motion for *habeas corpus* pursuant to 28 U.S.C. § 2254 in the Eastern District of Texas. Petitioner argued that defense counsel failed to investigate or present evidence which would have mitigated against the imposition of the death penalty. Specifically, Petitioner claims that counsel failed to investigate his family background or his social, medical and mental history.

The District Court cited well established precedent that to prove ineffective assistance of counsel, a criminal defendant must show that his attorney's assistance was deficient and that the deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, a petitioner must demonstrate that counsel's representation fell below an objective standard or reasonableness. *Id*. at 688. To determine what is reasonable, the district court looked to the ABA guidelines. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Specifically, the court referred to ABA guideline 11.8.6 which states that counsel should consider presenting information on medical history, educational history, and *family and social history*. *Id*. (emphasis in original). Petitioner's defense counsel admittedly failed to consider this potentially mitigating evidence. Thus, the court was persuaded that Petitioner's counsel fell "far short of professional norms when they failed to investigate his background, [especially since] counsel's affidavit indicates that there was no strategy behind the decision to forego an investigation of or to present evidence or Petitioner's childhood." *Clark v. Quarterman*, 2007 U.S. Dist. LEXIS 68249 *6.

The district court held that defense counsel was ineffective for failing to interview Petitioner's parents, despite arguments that Petitioner himself blocked counsel from conducting the interviews. However, the fact that Petitioner insisted his parents no be called to testify at the punishment phase does not excuse counsel's duty to investigate possible mitigating evidence. The ABA guidelines expressly state that "[t]he duty to investigate [mitigating evidence] exists regardless of the expressed desires of a client."

Murphy v. Sirmons**,** 497 F. Supp. 2d 1257 (E.D. OK. Aug. 1, 2007)
Petitioner was convicted of first degree murder and sentenced to death. Petitioner now seeks relief from his death sentence pursuant to 28 U.S.C §2254. Among other arguments, Petitioner asserted that trial counsel was ineffective. Specifically, Petitioner argued that because counsel tried several death penalty cases in a relatively short period of time, he failed to allocate a reasonable amount of time to investigate Petitioner's life history.

In his argument, Petitioner cited the ABA Guidelines mandating that counsel spend 1800 hours on this case and since counsel tried four other death penalty cases within a space of ten calendar months, he could not have allocated a reasonable amount of time to investigate

Petitioner's life. The court found, however, that the ABA Guidelines cited by Petitioner were not adopted until February 2003, roughly three yeas after Petitioner's trial. Further, the ABA Guidelines make it clear that many things other than the number of cases assigned to an attorney would have to be considered in ascertaining a reasonable workload for a given attorney.

Haliym v. Mitchell, 492 F.3d 680 (6th Cir. Jul. 13, 2007).
The Sixth Circuit Court of Appeals affirmed the denial of the plaintiff-prisoner's writ of habeas corpus concerning the convictions, but reversed the denial of the writ with respect to the sentences. *Haliym*, 2007 FED App. 0263P at *1. The court found that the defendant was denied effective assistance of counsel during the mitigation phase of his sentencing proceedings. *Id*.

In citing the ABA Guidelines, the court noted that defense counsel's performance "fell short of several of the American Bar Association's Guidelines." *Id*. at *30. The court stated that the Guidelines have long been considered guides to determining what reasonable conduct is for defense counsel, and specifically stated that they "explicitly recognize that competent counsel will investigate and discover all the evidence that Petitioner's counsel failed to unearth." *Id*. Finally, the court noted that when defense counsel presents mitigating evidence during sentencing proceedings, counsel has "an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." *Id*. (citing ABA Guideline 10.7). The court elaborated on this by commenting that investigation should include "members of the client's immediate and extended family;" but also "medical history, which includes physical injury and neurological damage; and family and social history, which includes physical . . . abuse, . . . domestic violence . . . exposure to criminal violence, [and] the loss of a loved one." *Id*.

Hartman v. Bagley, 492 F.3d 347 (6th Cir. Jul. 10, 2007).
The Sixth Circuit Court of Appeals affirmed the district courts denial of petitioner's writ of habeas corpus but added three more claims to the petitioners COA.

In citing the ABA Guidelines in his concurrence, Judge Clay wrote that "trial counsel unreasonably limited his investigation, all but foreclosing consideration of three potential mitigating factors." He noted that consistent with the ABA Guidelines "[r]ecords should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help . . . underscore the hereditary nature of a particular impairment. Hamblin v. Mitchell, 354 F.3d 482, 487 n.2, 488 (6th Cir. 2003) (quoting ABA Guidelines for the Appointment & Performance of Def. Counsel in Death Penalty Cases P 10.7, at 80-83 (2003)) (citing the "2003 ABA Guidelines . . . because they are the clearest exposition of counsel's duties at the penalty phase . . ., duties that were recognized by this court as applicable to the 1982 trial of the defendant in Glenn v. Tate"). A "reasonably competent attorney" would have pursued stronger evidence of genetic alcoholism. See Wiggins, 539 U.S. at 534.

Prevatte v. Baker, 499 F. Supp. 2d 1324 (N.D. Ga. July 4, 2007).
Petitioner challenges two aspects of the Court's decision to deny relief on his claim based upon the ineffective assistance of counsel: (1) that counsel's failure to seek a continuance was not

objectively unreasonable, and (2) that counsel's failure to interview one of the state's witnesses was neither objectively unreasonable nor prejudicial.

Petitioner argued that “barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to ... eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself.” ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003). However, the court does not find this persuasive, considering this guideline was issued almost 20 years after Petitioner’s trial. Supporting this contention the court notes, contrary to Petitioner's argument, that Supreme Court in Rompilla did not rely on the 2003 Guidelines in concluding that defense counsel conducted an inadequate investigation in 1989. Rather, in assessing the adequacy of counsel's investigation in that case, the Supreme Court relied upon the 1982 ABA Standards for Criminal Justice which were in effect at the time of Rompilla's trial. See Rompilla, 545 U.S. at 387 (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)). While the Court did make reference to later-promulgated versions of the guidelines, the Court viewed those guidelines as simply more explicit statements of the pronouncements contained in 1982 guidelines. Id. at 387 n.6 (noting that the Court saw "no material difference" between the phrasing of 1982 and 1993 versions of ABA guidelines); id. at 387 n.7 (noting that 1989 version of ABA guidelines, promulgated shortly after Rompilla's trial, "applied the clear requirements for investigation set forth in the earlier [1982] Standards to death penalty cases," and that 2003 Guidelines "are even more explicit"). Thus, the Supreme Court in Rompilla did not rely on ABA guidelines promulgated years after the defendant's trial to assess his attorney's performance, and the Court is not required to so in this case.

Furthermore, the court contended that even if it were required to consider the 2003 Guidelines, it would not reconsider its prior judgment. While the Supreme Court has recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable," Strickland, 466 U.S. at 688; see also Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (finding that trial counsel's conduct "fell short" of the standards set forth in the ABA Guidelines), the Supreme Court has emphasized that they are only guides.

Diaz v. Quarterman, No. 05-70057, 2007 U.S. App. LEXIS 15855 (5th Cir. Jul. 3, 2007).
The Fifth Circuit Court of Appeals affirmed the district court’s denial of habeas relief. While addressing the petitioner’s ineffective assistance of counsel claim, however, the court noted that “prevailing professional norms” require a defendant’s attorney to investigate multiple areas of inquiry. The court cited to Guideline 11.4.1(c), stating that attorneys have a duty to investigate their “defendant’s background, including ‘medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.’”

Morris v. Beard, Civil Action No. 01-3070 (E.D. Pa. Jun. 20, 2007).
The Eastern District of Pennsylvania found that defense counsel failed to conduct a reasonable investigation of mitigating evidence and failed to present that evidence during the penalty phase of the proceedings. The court declared that defense counsel’s failure to make a sufficient argument violated Morris’ Sixth Amendment right to effective assistance of counsel. In addition, the court found that Morris’ counsel operated under a conflict of interest.

In citing the ABA Guidelines, the court relies on the 1989 edition and states that under a *Strickland* claim, the method to determine the prevailing norms of professional conduct is to

reference the ABA Guidelines, which are referred to as "guides to determine what is reasonable." *Morris*, No. 01-3070 at *37. The court also stated that although the Guidelines were adopted five years after the defendant's conviction, they simply reflect prevailing norms in the legal profession that had already existed. *Id*. The court finds the Guidelines to be "effective standards by which to judge the reasonableness of counsel's conduct." *Id*. at *38. Finally, the court notes that the Guidelines are a codification of "long-standing, common-sense principles of representation understood by diligent, competent counsel in death penalty cases." *Id*.

The court cited to Guidelines 11.8.2(D) in stating that defense counsel has a duty to investigate and present all available mitigating evidence to the jury in the most effective way possible. *Id.* The court elaborated on the type of mitigating evidence to produce, commenting on relevant types of evidence, such as "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id*. at *39. Further, the court noted that defense counsel in a death penalty case has a duty to begin investigating mitigating evidence "at the *start* of the case." *Id*. at *52 (emphasis added).

Stevens v. McBride, 489 F.3d 883 (7th Cir. 2007).
The Seventh Circuit Court of Appeals affirmed the judgment of the district court in denying habeas relief as to the defendant's conviction, but vacated the judgment as it related to the death sentence and remanded the case with instructions to issue a conditional writ of habeas corpus. The court found that the failure to present certain mitigation evidence during the sentencing phase constituted ineffective assistance of counsel. In addition, the presentation of a witness whose testimony was damaging at trial and whom the defense counsel considered to be a "quack" at sentencing was also ineffective assistance.

In citing to the ABA Guidelines, the court reiterated the notion that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."

Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007).
The Tenth Circuit Court of Appeals reversed the district court's denial of habeas relief as to the defendant's sentencing and was remanded to the district court with instructions to issue a writ of habeas corpus. The court found that defense counsel's failure to investigate or discover readily available mitigation evidence regarding the defendant's family history and mental health amounted to constitutionally deficient performance. In addition, the court also found that defense counsel's conduct prejudiced the proceedings, as it left the motive for the murders unanswered.

In citing to the ABA Guidelines, the court noted that investigation into mitigating evidence involves discovering "all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Anderson*, 476 F.3d at 1142 (citing ABA Guideline 11.4.1(C)). The court declared that evidence relating to the defendant's mental health history and family life represented "just the kind of mitigation evidence trial counsel is obligated to investigate and develop as part of building an effective case in mitigation during the penalty phase of the trial." *Id*. at 1144.

Jefferson v. Terry, 490 F. Supp.2d 1261 (N.D.Ga. 2007).
The United States District Court for the Northern District of Georgia vacated the defendant's sentence and ordered a new sentencing hearing based on the ineffective assistance of counsel provided by the defendant's trial counsel. The court found that defense counsel was deficient in failing to investigate and present mitigating evidence of possible brain damage.

In citing the ABA Guidelines, the court noted the ineffective assistance of counsel standard set out in Strickland, supra, and cited to Guideline 11.4.1(c). That guideline provides that investigation into possibly mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutors."

Outten v. Kearney, 464 F.3d 401 (3d Cir. 2006).
The Court of Appeals for the Third Circuit reversed and remanded this case to the district court with an order to grant a writ of habeas corpus as to the penalty phase of the trial. The court ordered the state court to conduct a new sentencing hearing, or in the alternative, to sentence the defendant to life imprisonment. The court found that the defendant's trial counsel failed to conduct a reasonable investigation into the defendant's background in preparation as mitigating evidence during the penalty phase. Because of this lack of investigation, the court found that the defendant received ineffective assistance of counsel. The court declared that had counsel investigated and discovered mitigating evidence, at least one juror would have voted differently.

In citing the ABA Guidelines, the court noted that the ABA "applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed . . . similarly forceful directives." Outten, 464 F.3d at 417 (quoting Rompilla v. Beard, 545 U.S. at 376 n.7). The court further noted that the prevailing professional norms for capital cases required the trial counsel "to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guideline 11.4.1.

Dickerson v. Bagley, 453 F.3d 690 (6th Cir. 2006).
The Sixth Circuit granted Dickerson a new penalty phase, finding that trial counsel was ineffective for failing to conduct a proper investigation into available mitigation evidence. Citing the 1989 and 2003 ABA Guidelines, the court noted that "the Supreme Court, in the last three years, in two different death penalty ineffective assistance of counsel cases, has made it clear and come down hard on the point that a thorough and complete mitigation investigation is absolutely necessary in capital cases." *Dickerson*, 453 F.3d at 691. In applying Guideline 10.7 (2003), the court noted that "the ABA Guidelines…create the required standards of performance for counsel in capital cases regarding the investigation of mitigating circumstances" and found that Dickerson's counsel fell "far short" of meeting the applicable standards. *Id*. at 692. In particular, the Sixth Circuit found that there was no explanation for counsel not conducting "any mitigation investigation of facts concerning Dickerson's medical history, family and social history, educational history, or any of the other factors listed in the ABA Guidelines." *Id*. at 693.

Hedrick v. True, 443 F. 3d 342 (4th Cir. 2006).
In the course of assessing Hedrick's claim of ineffective assistance of counsel due to inadequate mitigation investigation, the Fourth Circuit majority noted that "investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the

prosecutor.' " *Wiggins v. Smith,* 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93 (1989) [hereinafter ABA Guidelines]). *Hedrick*, 443 F.3d at 347. The Fourth Circuit concluded that even though the trial counsel did not uncover and present all evidence of Hedrick's family history of drug and alcohol abuse, incompetent parenting, and his mother's criminal record (welfare fraud), this did not arise to the level of ineffective assistance of counsel.

Lundgren v. Mitchell, 440 F.3d 754 (6th Cir. 2006).
The Sixth Circuit affirmed Lundgren's conviction and sentence, stating that defense's failure to present an insanity plea did not constitute ineffective assistance of counsel. In this case, both the majority and the dissent cited the ABA Guidelines.

The majority cites to *Wiggins* and the ABA Guidelines in the context of discussing the reasonableness of counsel's decision: "More recent ABA Guidelines, which the United States Supreme Court has recognized as reflecting prevailing professional norms, emphasize that 'investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' *Wiggins,* 539 U.S. at 524, 123 S.Ct. 2527 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.4.1(C), p. 93 (1989) and adding emphasis)." 440 F. 3d at 771.

The lengthy dissent cites both the 1989 and the 2003 ABA guidelines in finding that the failure of Lundgren's counsel to present the insanity defense was "manifestly ineffective." Judge Gilbert Merritt's dissent quotes *Hamblin v. Mitchell*, 354 F. 3d 482, 487 (6th Cir. 2003), for the principle that the 2003 Guidelines "merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases." 440 F. 3d at 797. The dissent in *Lundgren* also went on to cite the Commentary to the 1989 and 2003 Guidelines: "The 2003 ABA Guidelines similarly counsel attorneys to 'consider all legal claims potentially available,' to 'thoroughly investigate the basis for each potential claim,' and to 'be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.' ABA Guidelines 10.8(1)-(2), p. 86 (2003); *id.* at 10.8, commentary, p. 89." 440 F. 3d at 797.

Martinez v. Dretke, No. Civ.A. G-02-718, 2006 WL 305666 (S.D. Tex. Feb. 7, 2006), *rev'd*, *Martinez v. Quarterman*, 481 F.3d 249 (5th Cir. 2007)
The District Court granted Martinez's petition for writ of habeas corpus based on the ineffective assistance of counsel provided to Martinez. Martinez's counsel failed to properly investigate his client's epilepsy, which could have been used as mitigation evidence. 2006 WL 305666 at 4. While defense counsel claimed that he believed a death sentence in the case was a "virtual guarantee" and that is why no mitigation investigation was undertaken, the court pointed to the ABA Guidelines which state that counsel "may not sit idly by, thinking that investigation would be futile." *Id.* at 3. Relying on the 1989 Guidelines and the *Wiggins* decision, the court noted that while the Guidelines are not binding on a federal court's decision, the Supreme Court has clearly indicated that they should be taken into consideration. In light of what the ABA Guidelines dictate about the duty to fully investigate a client's case and the *Wiggins* decision, the district court held that Martinez's attorney had not fully investigated potential mitigation evidence and, in so doing, had rendered ineffective counsel. *Id.*

The Fifth Circuit Court of Appeals reversed, and stated that defense counsel made reasonable

professional judgment to limit their investigation into the defendant's mitigating evidence at the punishment phase; and also that the defendant could not show that this strategic decision by defense counsel had prejudiced him, but the court did not claim that any ABA Guidelines were improper. *See Martinez v. Quarterman*, 481 F.3d 249 (5th Cir. 2007)

Summerlin v. Schriro, 427 F.3d 623 (9th Cir. 2005).
The Ninth Circuit granted a petition for habeas relief as to the penalty phase of a capital trial, holding that defense counsel was prejudicially ineffective for failure to present mitigating evidence. The court cites *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) for the proposition that ABA Standards for Criminal Justice represent the "indicia of obligations for criminal defense attorneys. Following this, the opinion makes several references to the 1980 ABA Standards for Criminal Justice in effect at the time of the trial in question. The court begins by identifying the general duty to investigate mitigating evidence, and moves on to cite specific areas (such as mental health, substance abuse, and prior criminal record) which defense counsel has a duty to investigate. The 1989 Guidelines are cited once (along with several references to the 1980 standards) in a paragraph underlining counsel's "virtually absolute" duty to do whatever necessary to "avoid the death penalty and achieve the least restrictive and burdensome sentencing alternative," even in the face of resistance by the criminal defendant. 427 F. 3d at 638.

Clark v. Mitchell, 425 F.3d 270 (6th Cir. 2005).
The Sixth Circuit affirmed Clark's conviction and sentence, holding that the defense failure to call a neuroscientist or pharmacologist to present mitigating evidence during sentencing did not constitute ineffective assistance of counsel. Clark argued that such testimony would have established the existence of organic brain damage. Defense counsel, however, relied upon the report of the retained psychologist, which did not indicate that such brain damage was a potential factor and did not recommend any further medical testing. The Court held that defense counsel was not ineffective for relying on the opinion of the expert psychologist. *Id*. at 286. The opinion made note of the fact that by employing a defense psychologist to conduct an independent evaluation, defense counsel was acting in conformity with ABA Guidelines. *Id.* at n. 5.

In dissent, Circuit Judge Merritt argued that the necessity of further medical testing was indicated in the psychologist's report, in language simply ignored by the majority. The opinion cites to the Guidelines for the proposition that the defense must not rely on the counsel's own observations and beliefs regarding the defendant's symptoms. *Id.* at 291, n.1. Merritt goes on to argue that the majority simply flouts the holdings of *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 347 (2005), which recognize the ABA Guidelines as the normative standards for defense counsel; the opinion emphasizes the duty as articulated in the 1989 edition of the Guidelines to provide for neurological testing in appropriate circumstances. *Id.* at 293-94.

Moore v. Parker, 425 F. 3d 250 (6th Cir. 2005)(dissent).
The Sixth Circuit affirmed a denial of post-conviction relief for ineffective assistance of counsel. In dissent, Judge Martin argued that at the sentencing phase of trial defense counsel failed to perform according to prevailing professional standards, as reflected by the duties of counsel articulated in the ABA Guidelines. Citing to the reference to the ABA Guidelines in *Wiggins v. Smith*, 539 U.S. 510 (2003), the dissent powerfully emphasizes that defense counsel has a duty

to thoroughly investigate the background of the defendant, including medical history, family and social history, and prior correctional experience; this duty was breached when counsel decided to more narrowly limit the scope of the investigation into mitigating circumstances. "The Supreme Court has made clear that the 'ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases.' *Hamblin v. Mitchell,* 354 F.3d 482, 486 (6th Cir.2004*)*(quoting *Wiggins,* 539 U.S. at 524*).*" Id. at 261.

United States v. Kreutzer, 61 M.J. 293 (C.A.A.F. 2005).
The United States Court of Appeals for the Armed Forces affirmed the decision to set aside a conviction of premeditated capital murder on the basis that the general court-martial erred in refusing to appoint a mitigation specialist to the capital defense team. The Court cites to ABA Guidelines during its discussion of the role of the mitigation specialist, noting that such an investigator is referred to as a "core member" of the defense team. *Id.* at *9. The Court further noted that "[a]s the Commentary to ABA Death Penalty Counsel Guideline 4.1 states, the mitigation specialist is an "indispensable member of the defense team throughout all capital proceedings."

Harries v. Bell**,** 417 F.3d 631 (6th Cir. 2005).
Judge Cook wrote for the Sixth Circuit affirming a finding of ineffective assistance of counsel for failure to investigate and present any mitigating evidence at the penalty phase of Randy Harries' Tennessee murder trial. Citing to Wiggins as an example, the opinion notes that "notwithstanding the deference *Strickland* requires, neither this court nor the Supreme Court has hesitated to deem deficient counsel's failure to fulfill this obligation." *Id*. at 637. In discussing whether the failure to investigate mitigating evidence could be seen as reasonable, the court notes that in 1973 the Tennessee Supreme Court adopted the American Bar Association Standards for the Administration of Criminal Justice as the "standard for defense counsel," as well as noting the more recent adoption of the ABA Guidelines by the Supreme Court in *Wiggins*. *Id*. at 638. The Court refers to this adoption as "binding precedent." *Id*.

Earp v. Ornoski, 431 F.3d 1158 (9th Cir. 2005).
The Ninth Circuit held that the petitioner was entitled to, among other things, an evidentiary hearing on his ineffective assistance of counsel claim "because he has demonstrated a colorable claim that counsel's mitigation investigation was deficient in light of the evidence uncovered, and that he suffered prejudice thereby." *Id*. at 1185.

Earp had argued that he was denied effective assistance of counsel due to defense counsel's failure to follow up on leads discovered by the defense investigator. The defense counsel failed to present the following mitigating evidence in the penalty phase: 1) records of Earp's educational history, including documentation of a history of emotional problems and possible psychological or neurological problems, 2) further information about Earp's family background (history of alcoholism, depression and suicide), a history of substance abuse and mental problems, and 3) neurological and psychiatric evaluations indicating organic brain damage resulting from a childhood head injury. The Ninth Circuit analyzed the facts presented in relation to those presented in the *Wiggins v. Smith* case. In doing so, the Ninth Circuit cited to the ABA Guidelines: "The relevant ABA guidelines state that counsel in capital cases should consider the following information about a petitioner: medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional

experience, and religious and cultural influences. *Id.* (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6, p. 133)." *Earp*, 431 F. 3d at 1175.

Smith v. Dretke, 422 F. 3d 269 (5th Cir. 2005).
In this opinion, the Fifth Circuit granted a certificate of appealability to Smith on several issues, including the issue of whether his trial counsel was ineffective. In doing so, the Fifth Circuit discussed at length the Supreme Court jurisprudence in *Wiggins* and *Rompilla* and cited to the ABA Guidelines. "The [Supreme] Court held that Wiggins' trial counsel's investigation was inadequate because 'counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.' 539 U.S. at 524 (citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (1989)(stating that among the topics counsel should consider presenting are medical history, educational history, employment history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences))." 422 F. 3d at 279. At the penalty phase, Smith's counsel called only 4 witnesses to testify. One was Smith's mother, who testified that he grew up in impoverished circumstances and that she was a single mother on welfare. In post-conviction, however, affidavits from many family members, including several of Smith's siblings, many cousins, and his grandmother, with whom he lived at some points in his childhood, indicated that Smith's mother frequently abused and whipped her children and that none of her children could read nor write. Smith's trial counsel did not interview any of these family members.

Woodard v. Mitchell, No. 1:98CV1403, 2005 U.S. Dist. LEXIS 22109 (N.D. Ohio Sep. 30, 2005
The U.S. District Court for the Northern District of Ohio denied the defendant's request for habeas relief as to his conviction, but did grant habeas relief as to the sentencing. The court found that defense counsel was ineffective for failing to investigate and prepare for the mitigation phase of the trial. Specifically, the court found that defense counsel failed to conduct an adequate investigation into the defendant's family and social history. In addition, defense counsel failed to discuss his strategy with the client and did not inform him as to the nature of the sentencing hearing, but rather advised him to plead for his life. The court found that defense counsel's conduct was prejudicial to the outcome of the trial.

In citing to the ABA Guidelines, the court noted that defense counsel should begin investigating mitigating evidence "immediately upon counsel's entry into the case and should be pursued expeditiously." *Woodard*, 2005 U.S. Dist LEXIS at *30. The court also noted the importance of defense counsel discussing the sentencing phase with the client before it occurs, and it emphasized the different topic areas, including family and social history, that should be addressed during the sentencing phase of the proceedings. *Id*. at *31.

***Mason v. Mitchell*,** 396 F.Supp.2d 837 (N.D. Ga. 2005).
The District Court, in denying Mason's petition for habeas corpus relief, held that Mason's counsel did not provide ineffective assistance in conducting the mitigation investigation for the sentencing phase of the trail. In reaching this determination, the court looked to the 1989 ABA Guidelines and quoted Guideline 11.4.1, as well as the commentary to the Guideline. 396 F.Supp.2d at 852. The court used Guideline 11.4.1 to detail what investigation Mason's attorney should have undertaken in regard to mitigation evidence, and then turned to Guideline 11.8.3 to analyze what steps the counsel needed to take in preparation for the mitigation

presentation. *Id.* As noted by the court, the ABA Guidelines state that counsel should discuss the sentencing phase with their client and that counsel must be proactive in their mitigation investigation and presentation. *Id.* at 852-53. After quoting the Guidelines, the court held that Mason's counsel undertook sufficient efforts to investigate and procure mitigation evidence and found that the investigation was not unreasonable. *Id.* at 854. In reaching their ultimate decision the court contrasted the facts in Mason's case from those present in *Wiggins*. *Id.* Finally, the court found that defense counsel's overall mitigation strategy was sufficient, based on ABA Guideline 11.8.6 (1989). *Id.* at 855. The court found that counsel performed a thorough investigation of Mason's background and that he sought advice from other qualified attorneys, who had experience in trying death penalty cases. *Id.* The court noted that obtaining advice from other counsel regarding mitigation strategy comports with ABA Guidelines. *Id.*

Crowe v. Terry**,** 426 F.Supp.2d 1310 (N.D. Ga. 2005).
In denying Crowe's petition for writ of habeas corpus, the District Court ruled that defendant counsel's performance was not inadequate. In support of Crowe's claim of ineffective assistance, Crowe pointed to his attorney's failure to interview and challenge the designation of experts used by the prosecution. *Crowe*, 426 F.Supp.2d at 1317. In making this argument, Crowe pointed to the ABA Guidelines, which state that trial counsel must be experienced in the utilization of expert witnesses. The court, addressing the argument, cited the 2003 ABA Guidelines: "The guidelines state that trial counsel 'must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, and must be able to challenge zealously the prosecution's evidence and experts through effective cross-examination.' American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Introduction (2003)." *Id.* The court further stated that whether or not counsel's cross-examination was "effective" must be decided on a case-by-case basis and concluded that the counsel's assistance in this instance was not ineffective.

Mitts v. Bagley**,** 2005 WL 2416929 (N.D. Ohio Sept. 29, 2005).
In denying Mitts' petition for writ of habeas corpus, the District Court ruled that Mitts' counsel did not render ineffective assistance in his investigation of potential mitigation evidence. In reaching this decision, the court cited the *Wiggins* decision and quoted ABA Guideline 11.4.1.(C) (1989). 2005 WL 2416929 at *83. After quoting the Guideline, and setting out the facts of the counsel's performance in *Wiggins*, the court in this case found that Mitts' counsel sufficiently investigated potential mitigation evidence and found that the counsel did not render ineffective assistance. *Id.*

Thomas v. Beard, 388 F.Supp.2d 489 (E.D. Pa. 2005).
The District Court granted Thomas's petition for writ of habeas corpus based on ineffective assistance of counsel. The court found that Thomas' trial counsel failed to investigate and/or present mitigating evidence during the sentencing phase of the murder trial and that this failure was prejudicial to Thomas. In making this determination, the court cited to the *Wiggins* decision and quoted ABA Guideline 11.4.1(C) (1989). *Thomas*, 388 F.Supp.2d at 505. Specifically, the court quoted language from *Wiggins* which held that a mitigation investigation "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* The court found Thomas's counsel to be ineffective based on the ABA Guidelines even though Thomas may have directed his attorney not to present the mitigating evidence. *Id.* at 508.

United States v. Karake**,** 370 F.Supp.2d 275 (D.D.C. 2005).
The District Court, in deciding what evidence a defendant is entitled to in discovery regarding the aggravating factors enumerated in a death penalty notice, utilized the ABA Guidelines as guiding principles in determining how broad in scope the discovery should be. Recognizing that the government would use the aggravating factors in the potential penalty phase of the trial, the court cited the ABA Guidelines governing the investigatory duties of counsel with respect to the penalty phase of a capital trial. *Karake*, 370 F.Supp2d at 278. Citing Guideline 11.4.1(C)(1989), the court stated that counsel must "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* Additionally, the court noted Guideline 10.11(A) (2003), which states that counsel must "seek information that … rebuts the prosecution's case in aggravation" and Guideline 10.11(H)(2003) which requires counsel to "determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and *what evidence will be offered in support thereof*." *Id.* The court noted that these Guidelines are "fundamental principles" and looking to them would "assist the government in its assessment of whether and how to narrow the scope of any amended death penalty notice." While the court did not formally determine what discovery would be granted regarding the aggravating factors, it did set out what principles should be followed by the government regarding discovery of the aggravating factors.

Stitt v. United States, 369 F.Supp.2d 679 (E.D. Va. 2005).
Judge Jackson in the Eastern District of Virginia evaluated a petition for post-conviction relief, including multiple ineffective assistance claims. Considering one such claim based on the failure of counsel to advise the defendant to take a plea agreement for a life sentence, the *Stitt* opinion notes that "[t]he standards of the American Bar Association ("ABA") may serve as a guide to what is reasonable, but only as a guide, not a determinative rule. *See Strickland,* 466 U.S. at 688-89; *see also Jones v. Murray,* 947 F.2d 1106, 1110 (4th Cir.1991)." *Stitt*, 369 F.Supp.2d at 689. The court goes on to quote the 1989 Guidelines concerning negotiated pleas at length, emphasizing that in a capital case attorneys ought to remain open to the possibility of a settlement, regardless of personal opinions about the likely outcome of the case. *Id.* Although critical of the lead counsel's insistent refusal to enter negotiations with the State Department, the court found the claim to be without merit because co-counsel made repeated efforts to secure a plea agreement that the defendant rejected after weighing the differing advice offered by members of the defense team. *Id.* at 691. Ultimately, the court granted relief for ineffective assistance of counsel based on a conflict of interest hidden by lead counsel during trial for financial reasons. *Id.* at 695.

Rev'd on other grounds, 475 F.Supp.2d. 571 (holding that the district court must hold a resentencing hearing without convening a jury to consider the death penalty).

Canaan v. McBride, 395 F. 3d 376 (7th Cir. 2005).
In an opinion by Judge Harlington Wood Jr., the Seventh Circuit held that defense counsel rendered ineffective assistance when it failed to advise a client on trial for capital murder that he was entitled to testify at the penalty phase. The Seventh Circuit "follow[ed] the [Supreme] Court's lead in *Strickland* and *Wiggins* by looking first to the ABA Standards for Criminal Justice and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" to assess whether counsel's performance was reasonable under prevailing professional norms. *Canaan*, 395 F. 3d at 384. The court further noted that the ABA Guidelines

"represent 'well-defined norms' on which the [Supreme] Court has routinely relied." *Id*. (citing *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

***Allen v. Woodford**,* 395 F.3d 979 (9th Cir. 2005), amending Allen v. Woodford, 366 F.3d 823 (9th Cir. 2004).
The Ninth Circuit affirmed Allen's conviction and sentence. Although the court found that trial counsel's performance had been deficient during sentencing, it did not find that his deficient performance prejudiced the outcome of the trial and therefore denied relief.

Regarding the fact that second counsel was not sought, the court recognized that "the use of second counsel in defending capital cases is now recommended by the American Bar Association," but found that such a standard was not the prevailing norm at the time of Allen's trial in 1982. *Allen*, 395 F.3d at 998 (internal citation omitted).

The court looked to *Wiggins* when it assessed counsel's failure to adequately investigate and present mitigation evidence and cited the relevant ABA Guideline providing that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* at 1001. The court found that counsel did not begin to prepare mitigation evidence until a week before trial, and that his performance failed to meet the prevailing norms for reasonable performance at the time of trial. For these reasons, the court held that "counsel's untimely, hasty, and incomplete investigation of potential mitigation evidence for the penalty phase fell outside the 'range of reasonable professional assistance.'" *Id*. at 1001 (citing *Strickland*, 466 U.S. 668, 689 (1984)).

Kandies v. Polk, 385 F.3d 457 (4th Cir. 2004).
In the majority opinion, Judge Gregory stated that "[t]he Supreme Court, while using standards such as those set forth by the American Bar Association as guides for what is reasonable, has repeatedly declined to adopt a rigid checklist of things that defense counsel must do in *all* cases because 'no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.'" *Id*. at 470 (quoting *Strickland v. Washington*, 466 U.S. 668 at 688-89).

In his concurring opinion, Judge Michael analyzed Mr. Kandies' counsel's performance by looking to the ABA Guidelines. Judge Michael emphasized that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances." *Id.* at 479 (quoting *Strickland,* 466 U.S. at 688). " Judge Michael further noted that "courts must measure 'reasonableness under prevailing professional norms.' The American Bar Association's standards describing the duties of counsel are 'guides to determining what is reasonable.' Here, the ABA's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases offer specific guidance for client interviews in death penalty cases. 'As soon as is appropriate, counsel should,' among other things, 'collect information relevant to the sentencing phase of trial including, but not limited to: . . . family and social history (including physical, *sexual* or emotional abuse).' ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

11.4.1(D)(2) (1989) (emphasis added). The state court and my colleagues overlook this crucial standard." *Kandies*, 385 F.3d at 479.

Pointing out that defense counsel in this case failed to investigate evidence of childhood sexual abuse as a mitigating factor, Judge Michael stated that "[c]ounsel's utter failure to inquire into an area specifically mentioned in the ABA guidelines is a good indicator that his performance was constitutionally deficient." *Id.* (quoting *Strickland*, 466 U.S. at 688). Judge Michael further stated that "the ABA guidelines and common sense dictate that it is counsel's responsibility to inquire into specific areas that might prove useful in mitigation. Counsel cannot expect the accused or his family and friends to know what sorts of facts in the accused's background might be relevant to sentencing. Moreover, it is unrealistic to assume that facts going to mitigation - facts that are often painful to discuss because they may involve abuse or emotional trauma -- will be freely volunteered in open-ended interviews." *Id.* at 480.

Cert. granted, 545 U.S. 1137 (2005) (Judgment vacated and remanded to the Fourth Circuit Court of Appeals)

***Hartman v. Bagley**,* 333 F. Supp. 2d 632, (N.D.Ohio 2004).
Although they failed to find ineffectiveness in this case, the District Court began its discussion of Hartman's ineffective assistance of counsel claim by recognizing that in *Wiggins,* "the Supreme Court found that the American Bar Association's standards for counsel in death penalty cases provide the guiding standards to be used in defining the prevailing norms for capital cases." *Id*. at 672 (citing *Wiggins v. Smith*, 539 U.S. 510, 522). "The Sixth Circuit has recently addressed the *Wiggins* case and concluded that the '*Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the prevailing professional norms in ineffective assistance case.'" *Id.* (quoting *Hamblin v. Mitchell,* 354 F.3d 482 at 486). The court refers to the 2003 ABA guidelines and states that defense's mitigation evidence only covered 41 pages of transcript. The court went on to find that "[t]rial counsel's mitigation presentation was not exemplary and in certain respects may have fallen short of the ABA's standards." *Id.*

Lovitt v. True, 330 F. Supp. 2d 603 (E.D. Va. 2004).
In response to Mr. Lovitt's argument that his counsel's background investigation fell short of what is required by both the prevailing professional norms and the standards established by the American Bar Association, the Eastern District of Virginia acknowledged that the ABA standards "are widely accepted by federal courts." *Id.* at 643. The court went on to state that "[t]he ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Id.* (quoting ABA Guidelines 11.4.1(c). The Eastern District recognized that "[f]ederal courts have frequently relied upon the ABA standards as 'guides to determining what is reasonable' and that "[t]he ABA standards suggest that the scope of counsel's inquiry should include the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experiences, and religious and cultural influences. ABA Guidelines, 11.8.6, at 113." *Lovitt*, 330 F. Supp. 2d at 643.

The Court held, however, that "[p]etitioner has failed to persuade this Court that his counsel's decision not to perform additional mitigation investigation constituted anything less than sound trial strategy." *Id*. at 644-645.

***Smith v. Mullin**,* 379 F.3d 919 (10th Cir. 2004).
The Tenth Circuit held that counsel was ineffective for not presenting evidence of defendant's mental retardation, brain damage, and troubled background in the penalty phase.

Looking to the United States Supreme Court in its analysis, the Tenth Circuit noted that "[t]he Supreme Court has, time and again, cited 'the standards for capital defense work articulated by the (ABA) ... as guides to determining what is reasonable' performance." *Id.* at 942. (citations omitted). "Those standards repeatedly reference mental health evidence, describing it as 'of vital importance to the jury's decision at the punishment phase. … It was patently unreasonable for [trial counsel] to omit this evidence from his case for mitigation.'" *Id.* (citations omitted).

Davis v. Woodford, 384 F.3d 628 (9th Cir. 2004).
In *Davis*, Judge Betty Binns Fletcher cited the 2003 ABA Guidelines in her dissent, finding that "ineffective assistance of counsel probably affected the outcome" of the case. *Id.* at 655. Judge Fletcher noted that Davis's defense attorneys failed in their duty to present all available, non-cumulative mitigating evidence: "In *Wiggins,* the Court noted that the ABA Guidelines for capital defense work provide that effective assistance 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' *Id*. at 661-62 (citing *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) emphasis in the original). The dissent concluded that the petitioner should be granted an evidentiary hearing on several issues, including his competence to stand trial during the penalty phase and the incompetence of counsel based on failure to call additional mitigation witnesses.

***Cone v. Bell*,** 359 F.3d 785 (6th Cir. 2004), *rev'd, Bell v. Cone*, 543 U.S. 447 (2005).
The Sixth Circuit granted a new penalty phase proceeding to Cone on the grounds that one of the aggravating factors found by the jury--that the crime was "especially heinous, atrocious or cruel"--was unconstitutionally vague. The majority found that Cone had not procedurally defaulted on his Eighth Amendment claim because the State Supreme Court implicitly ruled on it.

In his concurring opinion, Judge Merritt argued that even had Cone procedurally defaulted on the claim, his attorney's failure to raise the issue and preserve it for review constituted ineffective assistance of counsel. Judge Merritt highlighted trial counsel's failure to object to the aggravator despite a recent Supreme Court decision invalidating similar language and found support for his opinion in the ABA Guidelines:

> This conclusion is further supported by the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. As pointed out in *Strickland*, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688, 104 S.Ct. 2052. American Bar Association standards are only "guides" and not "rules" for what constitutes ineffective assistance of counsel, *id.,* but in this case the guidelines speak clearly:
> One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial. For this

> reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later review.
> ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 91-92 (rev. ed.2003) (internal quotations omitted). In this case, not only did Cone's counsel fail to preserve "any and all" errors, he failed to preserve a claim based on binding Supreme Court precedent that was a sure winner as a matter of federal law and that, given the role of the "heinous, atrocious, and cruel" aggravator in the jury's deliberation of the death sentence, may well have saved his client's life. There can be no doubt that this error was "sufficiently egregious and prejudicial" to constitute cause for the procedural default of that claim.

359 F.3d at 803-04. Judge Merritt also pointed out that, although the 2003 edition of the Guidelines had not been published at the time of Cone's trial, his citation to them was appropriate because they are "an articulation of long-established 'fundamental' duties of trial counsel." *Id.* at 804 n.2 (internal citations omitted).

In subsequent history, the U.S. Supreme Court stated that the Tennessee Supreme Court's affirmance of the death sentence imposed based on jury's finding that murders were "especially heinous, atrocious, or cruel" was not contrary to clearly established Supreme Court precedent. *See Bell v. Cone*, 543 U.S. 447 (2005).

***Rompilla v. Horn**,* 355 F.3d 233 (3d Cir. 2004).
A three-judge panel of the Third Circuit overturned the district court's decision granting Rompilla a new penalty phase trial, which had been based in part on a finding that his trial counsel was ineffective during the sentencing phase. At issue was counsel's failure to adequately investigate and present evidence regarding Rompilla's family history and educational background, as well as his mental competence.

The majority insisted that the Guidelines are "only guides," and that counsel's failure to meet the standards set forth there does not necessarily indicate ineffective assistance under the standards articulated in *Strickland*. *Id.* at 259 n.14.

But in a strongly worded dissent, Judge Sloviter argued that *Wiggins* and *Williams* were both decided under the *Strickland* standard, and, therefore "these two later cases demonstrate how *Strickland* should be applied." *Id.* at 275. She noted that "[i]n *Wiggins*, the Supreme Court quoted from the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases . . ." regarding the investigation of mitigating evidence, and found that counsel's performance fell short of its "well-defined norms." *Id.* at 283 (citation omitted). Judge Sloviter considered the majority's "attempt to reconcile its conclusion that Rompilla's counsel provided effective assistance of counsel with the conclusion in *Wiggins* . . . nothing short of astonishing." *Id.*

Rompilla's petition for rehearing was denied by a closely divided court. 359 F.3d 310 (3d Cir. 2004). However, Judge Nygaard filed an opinion, joined by Judges Sloviter and McKee, agreeing with Judge Sloviter's earlier dissent. Judge Nygaard wrote:

> [t]he issue before us implicates the most fundamental and important of all rights - to be represented by effective counsel. All other rights will turn to ashes in the hands of a

> person who is without effective, professional, and zealous representation when accused of a crime (*emphasis added*). *Id.* at 310.

After giving examples of other capital cases in which "the range of what is deemed "effective" (by the courts) has widened to … and astonishing spectrum of shabby lawyering." *Id*. at 311. He continued:

> These disturbing examples of inept lawyering in capital cases have propelled professional organizations to act. The American Bar Association has promulgated "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." These Guidelines upgrade the minimum standard from "quality" legal representation to "high quality" legal representation. Included in those guidelines is the requirement that the capital defendant should "receive the assistance of all expert, investigative, and other ancillary professional services ... appropriate ... at all stages of the proceedings." Here, in my view, counsel's failure to conduct even the most rudimentary investigation into Rompilla's background falls short of being "effective" representation. I believe this level of representation violates not only the standards set out by the American Bar Association, but by accepting it as adequately effective, we continue to degrade the standard set out in *Strickland,* and ignore the sentiments expressed by Justice Sutherland in *Powell v. Alabama*.

Id. at 311-12 (citation omitted).

Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003).
In this capital case from Ohio, the Sixth Circuit granted a new penalty phase trial as the result of ineffective assistance of counsel. Defense counsel made no investigation into Hamblin's severely deprived and violent childhood or his psychological condition, and did nothing in preparation for the sentencing phase.

The majority opinion opened with an analysis of the proper standard against which to measure counsel's performance. It looked to the Supreme Court's decision in *Wiggins*, noting that "[i]n its discussion of the 1989 ABA Guidelines for counsel in capital cases, the Court held that the Guidelines set the applicable standards of performance for counsel . . . . Thus, the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases" (*emphasis added*). *Id.* at 486 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

The court went on to review several of its own prior decisions from the 1990s, concluding that "[o]ur analysis of counsel's obligations matches the standards of the 1989 Guidelines quoted by the Supreme Court in *Wiggins*." *Hamblin*, 354 F.3d at 486. Although Hamblin's trial took place before publication of the 1989 Guidelines, the court explained that they apply nonetheless:

> [T]he standards merely represent a codification of longstanding, common sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland.* They are the same type of longstanding norms referred to in *Strickland* in 1984 as "prevailing professional

> norms" as "guided" by "American Bar Association standards and the like." We see no reason to apply to counsel's performance here standards different from those adopted by the Supreme Court in *Wiggins* and consistently followed by our court in the past. The Court in *Wiggins* clearly holds . . . that it is not making "new law" on the effective assistance of counsel . . . ."

Id. at 487 (internal citations omitted). The court also noted that the "[n]ew ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in principle or concept from *Strickland*, *Wiggins* or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances." *Id.* at 487. The court then quoted extensively from the Guidelines regarding the duty to investigate mitigating evidence.

In concluding its discussion of the appropriate standards to use in evaluating counsel's performance, the Sixth Circuit explained that "[w]e cite the 1989 and 2003 ABA Guidelines simply because they are the clearest exposition of counsel's duties at the penalty phase of a capital case, duties that were recognized by this court as applicable [in] 1982." *Id.* at 488.

The court held that "[t]he record reveals that defense counsel's representation of Hamblin at the penalty stage of the case fell far short of prevailing standards of effective assistance of counsel as outlined in *Wiggins*, our previous cases and the 1989 and 2003 ABA Guidelines." *Id.* at 489. In its analysis, the court quoted from Guideline 10.7, explaining that "ABA and judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so requested." *Id.* at 492.

Longworth v. Ozmint, 302 F. Supp. 2d 535 (D.S.C. 2003).
The District Court in South Carolina found that failure to address the petitioner's procedurally defaulted claim of ineffective assistance of counsel would not result in a fundamental miscarriage of justice. Distinguishing the facts of this case from the petitioner's case in *Wiggins v. Smith*, the District Court emphasized that "[t]he Supreme Court noted in *Wiggins* that counsel 'abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.' 123 S.Ct. at 2537 (citing the ABA Guidelines for capital defense work)." *Id*. at 569 n.23. In *Longworth*, the District Court found that "by contrast, the evidence demonstrates that an investigation was made into the Petitioner's social, family, educational, medical, and employment history, through family members, medical records and experts, and that this information was known to counsel, but that counsel made the strategic decision not to use it because it was 'unremarkable'." *Id.*

Bryan v. Mullin*,* 335 F.3d 1207 (10th Cir. 2003).
The Tenth Circuit, sitting *en banc*, affirmed a three-judge panel's denial of habeas relief and held that trial counsel's failure to present evidence regarding Bryan's mental health did not constitute ineffective assistance of counsel. The court found that although Bryan had organic brain disease brought on by severe diabetes, suffered from paranoid delusions, and had previously been adjudicated incompetent to stand trial, his counsel's decision not to introduce this evidence at trial or during sentencing was reasonable.

Judge Henry, joined by three other judges, wrote separately to disagree with the majority's determination that Bryan had received effective assistance of counsel. He took issue with the majority's repeated references to the fact that Bryan and his elderly parents objected to the

presentation of evidence regarding Bryan's mental health. In his discussion of whether Bryan's counsel had properly explained the importance of mitigation evidence to the defendant and his family, Judge Henry cited to the Guidelines:

> The ABA's guidelines for capital defense work are "standards to which [the Supreme Court has] long referred to as " 'guides to determining what is reasonable.'" *Wiggins,* 539 U.S. 510, 524 (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052). For example, "[p]rior to the sentencing phase ... counsel should discuss with the client the specific sentencing phase procedures ... and advise the client of steps being taken in preparation for sentencing." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.11(C) (2003). Similarly, [c]ounsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body ..., means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation. *Id.* § 10.11(D). Furthermore, "[c]ounsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing ... body." *Id.* § 10.11(E). Despite these "well-defined norms," *Wiggins,* 539 U.S. at 524, however, it appears that counsel disregarded such responsibilities.

335 F.3d at 1238 n.6. Judge Henry also dismissed the argument that trial counsel's decision not to present mitigating evidence was reasonable because such evidence was inconsistent with trial strategy. He cited to the commentary for Guideline 10.11, "whether or not the guilt phase defense will be that the defendant did not commit the crime, counsel must be prepared from the outset to make the transition to the penalty phase." *Id.* at 1238-39 (citation omitted).

***United States v. Suarez*,** 233 F.Supp.2d 269 (D.P.R. Nov. 22, 2002).
The District Court held that the Federal Public Defender met all criteria necessary for appointment as "learned counsel" required by federal statute for capital cases. In making this determination, the court looked to the ABA Guidelines. *Suarez*, 233 F.Supp.2d at 271. The court stated that it was unable to find any federal appellate court guidance on the precise definition of "learned counsel" and instead looked to the ABA Guidelines. *Id.* The court's opinion reproduced Guideline 5.1 (1989). *Id*. at 272. Following Guideline 5.1 in the opinion, the court applied the Guideline to the public defender appointed in the case and found that he was qualified to be appointed as "learned counsel" pursuant to ABA Guidelines.

***United States v. Miranda*,** 148 F.Supp.2d 292 (S.D.N.Y. June 21, 2001).
After being indicted for conspiracy and murder, which carried a possible death sentence, Miranda sought additional court-appointed counsel on the grounds that he was charged with a capital crime. Judge Cote ordered a conference to determine whether the proposed second court-appointed attorney requested by Miranda qualified as "learned" in the law applicable to capital cases.

In Judge Cote's decision to hold a conference, she relied upon ABA Guideline 5.1 (1989), cited in full in the opinion. *Miranda*, 148 F.Supp.2d at 295-6. In writing about the Guidelines, Judge Cote explained that, "[I]n addition to familiarity with the jurisdiction and extensive criminal litigation training and experience, the ABA recommends that at least one attorney representing

a defendant charged with a capital crime have previously 'tried to completion' a capital case." *Id.* at 296. The requirements of Guideline 5.1 were comparable to those required of counsel in capital cases tried in New York pursuant to Section 35-b of the Judiciary Law. *Id.*

United States v. Murphy**,** 50 M.J. 4 (C.A.A.F. 1998).
The U.S. Court of Appeals for the Armed Forces set aside the death sentence of James Murphy because Murphy was denied effective assistance of counsel. While the court cited its decision in *Loving* (34 M.J. 1065), wherein the court declined to mandate that military defense counsel meet the ABA Guidelines, the court in this case did note that the ABA Guidelines are "instructive." *Murphy*, 50 M.J. at 13. After analyzing Murphy's various claims of ineffective assistance, the Court of Appeals agreed with the district court that his trial counsel was ineffective.

Crandell v. Bunnell, 144 F.3d 1213 (9th Cir. 1998), *overruled by Schell v. Witek*, 218 F. 3d 1017 (Cal. 2000).
The Ninth Circuit affirmed the district court's grant of Crandell's petition for habeas corpus. Judge Beezer held that defense counsel's representation was incompetent and the appointment of substitute counsel was warranted.

The district court, in granting the habeas petition, made a number of findings regarding the ineffectiveness of Crandell's trial counsel. Among these findings were that the public defender personally visited Crandell only one or two times, "violently disagreed" with Crandell, "failed to make reasonable efforts to establish a relationship of trust and confidence with Crandell," undertook little discovery, initiated no investigation of either guilt or penalty phase evidence, and made no attempt to interview any witnesses. 144 F.3d at 1217. At the district court habeas petition hearing, Crandell presented an expert witness on the professional norms for counsel in capital defense cases who testified that the public defender's behavior was "absolutely outrageous." *Id.* The expert's conclusion was based in part on the ABA Guidelines and the Ninth Circuit cited specifically to ABA Guideline 11.4.2 (1989) *Id.* The Ninth Circuit affirmed the district court's finding that Crandell's trial counsel was incompetent and that the state trial court should have appointed substitute counsel. *Id.*

The case was overruled by *Schell v. Witek*, only as to the standard applicable to motions to substitute counsel. 218 F. 3d. 1017 (Cal. 2000)

Brecheen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994) (Ebel, J., dissenting).
The Tenth Circuit affirmed the Eastern District of Oklahoma's denial of Brecheen's petition for writ of habeas corpus. Although Brecheen's trial counsel failed to present certain mitigating evidence at the penalty phase, the Tenth Circuit found this did not constitute ineffective representation.

Judge Ebel wrote in a dissenting opinion that he did not agree with the majority's conclusion that Brecheen had failed to establish that he had ineffective trial counsel during the sentencing phase. Judge Ebel wrote that, "The sentencing phase of a capital case is a vitally important proceeding and it requires careful preparation, advanced consultation with the client, and vigorous advocacy. It is not a stepchild to the guilt phase of the trial, but itself deserves to share center stage with the guilt phase." *Brecheen*, 41 F.3d at 1370. The dissent continued to explain

the importance of mitigating evidence in the sentencing phase of a trial and cited ABA Guidelines 11.4.1(A) & (C) (1989). *Id.*

STATE CASES

***State of Florida v. Kilgore*,** 2007 Fla. LEXIS 2201 (Nov. 21, 2007).
While serving a life sentence, Petitioner was charged with the murder of another inmate. Petitioner was convicted and during the penalty phase, a previous first-degree murder conviction was submitted by the State as an aggravator to justify the death sentence. The sentencing court sentenced Petitioner to death after finding two aggravating circumstances: (1) Petitioner was under sentence of imprisonment at the time he committed the murder; and (2) Petitioner had been previously convicted of a felony involving the use or threat of violence to the person both of which are related to the previous first degree murder conviction

Subsequently, the Office of the Capital Collateral Regional Counsel (CCRC) was appointed to represent Petitioner to collaterally challenge the first-degree murder conviction and death sentence. Having identified what counsel believed to be substantial grounds to challenge an important aggravator used by the State to justify a death sentence, CCRC sought to vacate the first murder conviction based upon the holding in *Brady* requiring disclosure of exculpatory evidence, including impeachment evidence. *See Brady v. Maryland,* 373 U.S. 83 (1963). In turn, however, the State filed a motion to bar CCRC from representing Petitioner in the first murder case, and the circuit court granted the motion on the basis that Florida's statutory scheme for appointment of counsel did not authorize CCRC's representation in the noncapital case.

The district court concluded that because Florida law required the prior judgment to be set aside in order for the aggravator to be challenged in the capital case, Petitioner was entitled to have effective counsel do what CCRC was attempting to do on his behalf, a course of action also consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003). However, the Supreme Court of Florida determined that while Petitioner himself is entitled to prosecute a collateral claim attacking a prior conviction utilized as an aggravator in his capital case, CCRC is not authorized to do so on his behalf since Florida's statute for appointment of counsel did not authorize CCR's representation in a noncapital case.

Ex Parte Van Alstyne, 2007 Tex. Crim. App LEXIS 1631 (Nov. 14, 2007).
Petitioner argued that he cannot be subjected to the death penalty, consistent with Atkins v. Virginia, because he is mentally retarded. The courted noted that the lower court judge who convicted Petitioner maintained a healthy skepticism of his own ability to gauge mental retardation based upon nothing more than his intuitive assessment of Petitoner's performance during a media interview. *See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES Guideline 4.1 (2003) ("The Defense Team and Supporting Services) Commentary, at 31 ("Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions [including mental retardation] that could be of critical importance. Accordingly, Subsection A(2) [of Guideline 4.1] mandates that at least one member of the defense team . . . be a person qualified by experience and training to screen for mental

and psychological disorders or defects and recommend such further investigation of the subject as may be deemed appropriate."); STATE BAR OF TEXAS GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL Guidelines 10.1(B)(2)(c) ("The Defense Team") & 12.2(B)(5)(b) ("Duties of Post-Trial Counsel") (2006) ("Habeas corpus counsel should not rely on his or her own observations of the capital client's mental status as sufficient to detect the array of conditions [including mental retardation] that could be of critical importance. For that reason, at least one member of the defense team should be qualified to screen for mental and psychological disorders or defects and recommend further investigation of the client if necessary.").

The court held that the record supports the lower court's finding that Petitioner has shown by a preponderance of the evidence that he falls within the range of mentally retarded offenders about whom there is a national consensus that they should not be executed.

State v. Young, 172 P.3d 138 (N.M. Oct. 2007).
The Fourth Judicial District Court judge denied defense counsel's motion which requested "compensa[tion] at an hourly rate, to be allowed to withdraw, and/or to dismiss the death penalty." 172 P.3d at 140. The judge denied the motion but noted, ". . . defense counsel should receive fair compensation for their excellent representation of the defendants, and that the State's failure to pay fair compensation indicates that New Mexico cannot afford the death penalty." Id.

Citing to the ABA Guidelines, the Supreme Court of New Mexico acknowledged the complexity of death penalty cases that "require a significantly greater degree of skill and experience on the part of defense counsel than is required in a noncapital case. *See* ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* Guideline 1.1, History of Guideline (rev. ed.2003), *in* 31 Hofstra L.Rev. 913, 921 (2004) [hereinafter *ABA Guidelines*]." Id. at 141. Furthermore, the Court scrutinized the use of a flat fee granted by the Public Defender Department which fails to compensate the defense counsel's overhead costs, and is less than the hourly wage a videographer working on the case would receive. The Court stated:

> Because of the extraordinary demands on capital defense attorneys, *ABA Guidelines,* Guideline 8.1 Commentary, *in* 31 Hofstra L.Rev. at 979, the American Bar Association has condemned flat fees, caps on compensation, and lump-sum contracts in death penalty cases. *Id.,* Guideline 9.1(B)(1), *in* 31 Hofstra L.Rev. at 981. Rather than a flat fee or a capped rate, the *ABA Guidelines* stress that "[c]ounsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation." *Id.,* Guideline 9.1(B), *in* 31 Hofstra L.Rev. at 981.

172 P.3d at 142. The Supreme Court reasoned inadequate compensation gives rise "to a presumption of ineffective assistance of counsel." Id. With these findings the Court ordered a stay of prosecution for the death penalty pending the state's ability to provide reasonable compensation. Id. at 144.

Jones v. Alabama, Ala. LEXIS 156 (Ala. Crim. App. Aug. 31, 2007); CR-05-0527
The Court of Criminal Appeals of Alabama affirmed petitioner's conviction and sentence of death. *Jones v. Alabama,* 2007 Ala. Crim. App. LEXIS 156, *9. Among other arguments, petitioner contended that since the state of Alabama does not provide for representation in capital cases in accordance with the ABA Guidelines, petitioner's constitutional rights were denied. *Id*. The court restated petitioner's to state that counsel rendered ineffective assistance to petitioner simply because Alabama has not adopted the guidelines set forth by the ABA. *Id*. Furthermore, petitioner failed to set forth any specific facts to establish that his rights to counsel and due process have been adversely affected because the state of Alabama has not adopted the ABA guidelines. *Id*. The court held that in order for a convicted defendant's claim that counsel's assistance was so defective as to warrant reversal of conviction or death sentence, two requirements, as outlined in *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984), must be met:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense."

Moreover, the court insisted that more specific guidelines than those detailed in *Strickland* are not appropriate. In fact, the court believes its ruling comports with all the Federal Courts of Appeals that have considered the issue; that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms. See *Michael v. Louisiana,* 350 U.S. 91, 100-101 (1955).

Although the court mentions the ABA guidelines as a method to determine what is reasonable, the court reaffirmed its notion that the guidelines set forth by the ABA are only guidelines and are not determinative, since no set of detailed rules can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. See *United States v. Decoster,* 199 U.S. App. D.C., at 371, 624 F.2d at 208.

In closing, the court asserted that it declined to find that counsel is per se ineffective simply because Alabama has not adopted the ABA guidelines. Although the ABA guidelines may, in some instances, provide guidance as to what is reasonable in terms of counsel's representation they are not determinative. Rather, the two pronged analysis set forth in *Strickland* remains the standard for deciding ineffective assistance of counsel. . *Jones,* 2007 Ala. Crim. App. LEXIS 156, *10.

State v. Andriano, 161 P.3d 540 (Ariz. July 2007).
The Supreme Court of Arizona affirmed Andriano's death sentence for the murder of her husband. Among Andriano's eleven claims was the trial court's failure to find "that the mitigating circumstances were 'sufficiently substantial to call for leniency.' A.R.S. § 13-703(E)." Id. at 554. The Court pointed to defense counsel as failing to fully argue this claim:

> Andriano did not argue why the Court should find in its independent review that the mitigating circumstances were "sufficiently substantial to call for leniency." A.R.S. § 13-703(E). Counsel in capital cases "should take advantage of all appropriate opportunities

> to argue why death is not suitable punishment for their particular client." *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* Guideline 10.11(L) (2003).

161 P.3d at 554. Although Andriano offered numerous mitigating factors to call for leniency (such as childhood abuse, strong religious convictions, domestic violence victim, and good inmate behavior), the Court affirmed the trial court's decision to give these factors minimal weight. Id. at 555.

State v. Garza, No. CR-04-0343-AP, 2007 Ariz. LEXIS 68 (Ariz. Jun. 29, 2007).
The Arizona Supreme Court automatically reviewed the sentence of death pursuant to A.R.S. § 13-703.04 (2006). In its review, the court affirmed the conviction and sentence. While the court did find that the presence of aggravating factors and the presentation of minimal mitigating evidence was sufficient for a sentence of death, it did note that defense counsel has numerous duties during the course of the trial.

In citing to the Guidelines, the court references to Guideline 10.11(L), indicating that death penalty counsel has a duty "at every state of the case" to "take advantage of all appropriate opportunities to argue why death is not a suitable punishment for their particular client." *Garza*, 2007 Ariz. LEXIS at *36 n.16. The court stated that in its automatic review of the sentence, it "should have been aided by argument of counsel" on the point of mitigation. *Id*. at *36. The court also stated that death penalty counsel should not merely rely on the State's statutory duty to review the record, referencing Guideline 10.15.1(C). Instead, the court declared that defense counsel should "seek to litigate all issues . . . that are arguably meritorious." *Id*. at *36 n.16.

State v. Morris, 160 P.3d 203, (Ariz. 2007); No. CR-05-0267-AP, Ariz. LEXIS 65, (Ariz. Jun. 18, 2007).
This case is the first case to be heard after the Arizona Legislature adopted Section 13-703.05, which requires the Arizona Supreme Court to determine if the trier of fact abused its discretion in finding aggravating circumstances and imposing a sentence of death. 2007 Ariz. LEXIS at *38. Other than the issue of prosecutorial misconduct, Morris did not raise any challenges to the penalty or aggravating phases of his trial. Nevertheless, the court determined that it must review all death sentences as the Arizona statute contains mandatory language. Id. at *39.

The court notes that mandatory review of all death sentences does not relieve death penalty counsel of its duty to "raise all meritorious arguments against a death sentence." Id. at *39-40 n.10. The court cited to Guideline 10.11.L, which states that "[c]ounsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client." Id. at *40 n.10.

Saldano v. Texas, 232 S.W.3d 77 (Tex. Crim. App. June 6, 2007).
Petitioner argued that the trial court erred in instructing the jury to decide any issue of fact that was not alleged in the indictment returned against the Defendant. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).
Specifically, Petitioner objeced to the jury being asked to determine whether, taking into consideration all of the evidence, including the circumstances of the offense, the Petitioner's character and background and the personal moral culpability is a sufficient mitigating

circumstance to warrant that a sentence of life imprisonment rather than a death sentence be imposed. However, the lack of a mitigating circumstance is not alleged in the indictment and accordingly the jury should not be asked to decide the question. The court should find that the case is one in which the state cannot seek the death penalty and sentence the Defendant to life in prison pursuant to [Article 37.071(1), TEX. CODE CRIM. PROC.]." The record revealed that the jury was instructed that it could not consider extraneous offenses unless it found beyond a reasonable doubt that appellant committed them.

Petitioner made various objections to the court's charge to the jury. These objections seemed consistent with the points of error raised on appeal. These [trial] objections were made to either bring about a reality of truth in jury charges, especially in death cases, or to implement recommendations of the American Bar Association's position as published by its Section of Individual Rights and Responsibilities "Death Without Justice: A Guideline for Examining the Administration of the Death Penalty in the United States," published June, 2001 and included in the publication of the State Bar of Texas "Capital Punishment: A Review of Recent Developments and Their Implications," February 8, 2006.

Despite Petitioner's argument, the court found it sufficient to dispose of these points by recognizing that the trial court submitted a charge consistent with applicable state statutes, which have withstood numerous constitutional challenges. These state statutory provisions meet federal constitutional requirements by narrowing the class of "death-eligible defendants" and they arguably provide more than required by the federal constitution by providing a jury a vehicle to "fully" consider mitigating evidence "in every conceivable manner in which the evidence might be relevant." *See Cockrell v. State*, 933 S.W.2d 73, 92-93 (Tex.Cr.App. 1996).

Dunlap v. People, 173 P.3d 1054 (Colo. May 2007).
Dunlap was sentenced to death for the murder of four Chuck E. Cheese employees during the commission of a robbery.

During the course of the trial Dunlap was transferred to Colorado Mental Health Institute at Pueblo (CMHIP) to undergo a mental health competency examination. Id. at 1064. Trial counsel appointed Dr. Fairbairn to render an independent psychiatric evaluation of Dunlap, but to counsel's dismay, Dr Fairbairn's opinion if admitted at trial, would have ultimately damaged Dunlap's defense. Id. "Dr. Fairbairn's eventual opinion was that 50 percent of the time Dunlap was normal, 40 percent of the time he was malingering symptoms, and 10 to 20 percent of the time he suffered from some sort of psychosis. Dr. Fairbairn did not diagnose a major mental illness." Id. Defense counsel filed a motion to exclude the evidence generated at CMHIP and the trial court ruled that the state could not use the evidence unless the defense "opened the door by presenting mental health evidence." 173 P.3d at 1064.

Citing to the 1989 version of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Sections 11.41 and 11.8.3, the Colorado Supreme Court stated, "Trial counsel in a death penalty case has the duty to investigate potential sources of mitigation evidence for the penalty phase of the trial. *Strickland*, 466 U.S. at 690-91." Id. at 1065. However, in this case the court agreed that presenting mental health mitigation evidence would have been "risky at best given the substantial amount of damaging evidence" generated from CMHIP. Id. at 1067. The court stated, "We decline to hold that in this case the decision to avoid such risky evidence, and the consequent decision to cut short the mental health investigation, falls below an objective standard of reasonableness." Id.

Ard v. Catoe, 372 S.C. 318 (S.C. Mar. 2007).
The trial court in this case granted the defendant a new trial based on an ineffective assistance of counsel claim. On appeal from that ruling, the Supreme Court of South Carolina found that the failure of defense counsel to introduce evidence which supported the conclusion that the victim may have handled the gun and to retain an independent expert amounted to ineffective assistance of counsel.

In citing the ABA Guidelines, the court noted that defense counsel has an obligation at every stage of the proceedings to "conduct thorough and independent investigations." *Ard*, 372 S.C. at 332. At trial, defense counsel hired the resigned supervisor of law enforcement officials who provided testimony in the case. The court found that the ABA Guidelines direct defense counsel to "aggressively examine all of the government's forensic evidence" with "the assistance of appropriate experts." *Id*. The court also stated that the ABA Guidelines "are not aspirational," but rather "are the same type of longstanding norms referred to in *Strickland* in 1984." *Id*. at 332 n.14.

Commonwealth v. Spotz, 896 A.2d 1191 (Pa. 2006).
Defendant appealed from an order of the Court of Common Pleas of Schuylkill County (Pennsylvania), which denied defendant's petition for post conviction relief, pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §§ 9541-9546. Spotz raised, among other issues, an ineffective assistance of counsel claim. The Court noted that,

> …the United States Supreme Court recently elucidated in *Rompilla v. Beard,* 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005*)*, this duty to perform a prompt investigation into the circumstances of a case includes the duty to "investigate prior convictions . . . that could be used as aggravating circumstances or otherwise come into evidence." Id. at 2466 n.7 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.7, cmt. (2003 rev. ed.)).

With the guidelines in mind they examined each of the claims raised by Spotz concerning mitigating evidence. The Court ruled that Spotz failed to show how his counsel was ineffective.

Kilgore v. State, 933 So. 2d. 1192 (Fla. Dist. Ct. App. 2006).
Florida's Second District Court of Appeal granted Dean Kilgore's appeal of an order from the Circuit Court of Polk County, which had dismissed the Office of the Capital Collateral Representative (CCRC) from representing Kilgore in a collateral attack challenging the validity of Kilgore's 1978 first-degree murder conviction which had been used as an aggravating factor in the penalty phase of his 1994 murder case. CCRC had been representing Kilgore in post-conviction for the 1994 conviction, for which he received the death penalty. The Circuit Court's order did not dismiss the underlying collateral proceeding, but dismissed CCRC from the representation of Kilgore in that proceeding.

The Second District Court of Appeal also certified to the Florida Supreme Court "a question of great importance to the Florida Supreme Court....

> Are counsel appointed to provide collateral representation to defendants sentenced to death, pursuant to Section 27.702, authorized to bring proceedings to attack the validity of a prior first-degree murder conviction that was used as a primary aggravator in the death sentencing phase?"

Kilgore, 933 So. 2d. at 1193.

The Court of Appeal certified the question because the Florida statute governing appointed counsel does not "explicitly deal with the situation where . . . a previous conviction is the primary aggravator for imposition of the death penalty, and to challenge the death penalty, the previous conviction must be challenged." *Id*. In certifying the question to the Florida Supreme Court, the Court of Appeal stated that, "in order to challenge the murder conviction aggravator, the prior judgment must have been set aside [and] that is the course that CCRC was attempting to take, and it is consistent with ABA Guidelines." *Id*. The Court of Appeal noted that CCRC's attempt to challenge Kilgore's previous first-degree murder conviction conformed with the requirements of the 2003 ABA Guidelines. The court also cited to the ABA Guidelines dealing with investigation (10.7), the duty to assert legal claims (10.8), and the duty of post-conviction counsel (10.15.1.E.4). *Id*.

As stated by the court, the Florida statute permits CCRC to challenge a death sentence as well as the conviction, and in this case one "method of attacking the sentence of death is to attack the primary aggravator, a prior first degree murder conviction." *Id*. The court noted the importance of this tactic, stating that "attacking an aggravating factor is a traditional and well-accepted method used to challenge death sentences." *Id*. The court cited the ABA Guidelines to show that the collateral attack of an aggravating factor is often necessary, noting that:

> Investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Rev. ed. Feb. 2003) (10.8, Duty to Assert Legal Claims, and such obligations are extended to post-conviction counsel, 10.15.1.E.4). Failure to pursue such a well-established course of action can be used to assert an ineffective assistance of counsel claim, if there was a right to counsel in this context. *See Rompilla v. Beard*, 545 U.S. 374 (2005).

Id.

Henry v. State, 937 So. 2d. 563 (Fla. 2006).
In denying petitioner's request for habeas corpus relief, the Florida Supreme Court ruled that defense counsel's performance was not inadequate. Citing the *Wiggins* decision, the court noted that the "principal concern … is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of defendant's background was itself reasonable." *Henry*, 937 So. 2d at 568. The court also stated that even where the defendant waives mitigation, trial counsel may still be ineffective for failing to properly investigate and prepare for the penalty phase of the trial. *Id*. at 570. The court additionally noted that the 2003 ABA Guidelines "mandate mitigation investigation and preparation, even if the client objects." *Id*. at 573.

In Henry's case, the court found that defense counsel complied with the ABA Guidelines by investigating the defendant's mental health history and subpoenaing witnesses for the penalty phase. *Id*. Henry refused to participate in the investigation and preparation of any type of mitigation, however, and the court concluded that trial counsel's preparation and Henry's decision to waive mitigation did not deny him a "reliable penalty phase proceeding." *Id*.

Menzies v. Galetka, 150 P.3d 480 (Utah 2006).
The Supreme Court of Utah found that defense counsel provided ineffective assistance during the portion of the proceedings where he was providing representation. As such, the court reversed the judgment and remanded the case to the trial court and sent instructions to set aside the relevant proceedings. The court found that defense counsel only spoke to the client about the case and the expected strategy once, and repeatedly ignored or deliberately avoided contact from the defendant.

In citing the ABA Guidelines, the court stated that "courts frequently rely on the professional standards established by the ABA when determining the relevant professional norms under the first prong of the Strickland analysis." *Menzies*, 150 P.3d at 512. The court also noted that the Supreme Court of the United States referred to the Guidelines as "prevailing norms of practice." *Stickland*, *supra*. The court specifically stated that it would "rely on the ABA Death Penalty Guidelines to the extent that they are relevant to our decision," *id*. at 513, because Utah's post-conviction do not contain any rules or procedures regarding counsel's performance. *Id*. at 512.

The court stated that one of the main duties of defense counsel is to "maintain close contact with the client regarding litigation developments." *Id*. at 513 (citing ABA Guideline 10.15.1(E)(1)). The court also noted that post-conviction counsel has additional obligations of investigating the performance of trial counsel as well as investigating the facts underlying the conviction and the sentence, referring to the comments to ABA Guideline 10.15.1. *Id*.

Davis v. State, No. CC-93-534, 2006 WL 510508 (Ala.Crim.App. March 3, 2006), *abrogated by Ex parte Clemons*, No. 1041915, 2007 WL 1300722 (Ala. May 04, 2007).
In denying petitioner's request for habeas corpus relief, the Court of Criminal Appeals ruled that Davis' claim of ineffective assistance of counsel was procedurally barred. 2006 WL 510508 at *10. The court noted, however, that had the claim not been procedurally barred the court would be "compelled to grant relief and order a new sentencing hearing." *Id*. The court stated that "Davis's most troubling claim is that counsel failed to investigate and present mitigation evidence at the penalty phase. The evidence Davis alleges should have been discovered and presented is powerful." *Id*. at *7. The court concluded that counsel "failed to conduct the type of reasonable investigation sanctioned by the ABA." *Id.* at *10.

Citing ABA Guideline 11.4.1(C) (1989), the court noted that "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Id*. at 9. According to the court, petitioner's counsel "failed to conduct the type of investigation sanctioned by the guidelines developed by the American Bar Association." *Id*. Additionally, the court found that defendant's counsel did nothing to investigate the prior offense that the State relied on to prove the aggravating circumstance that Davis had previously been convicted of a crime of violence. *Id*. As noted by the court, the United States Supreme Court ruled in *Rompilla v. Beard*, 545 U.S. 374, that counsel's performance was ineffective at the penalty phase because of a failure to investigate a prior felony that the State relied on to establish an aggravating circumstance. *Id*. The Davis court stated that the *Rompilla* decision, which determined that undiscovered mitigating evidence "might well have influenced the jury's appraisal of culpability," was applicable to Davis' case. *Id*.

Torres v. State, 120 P. 3d 1184 (Okla. Crim. App. 2005).
The Court of Criminal Appeals in Oklahoma denied the petitioner's application for post-conviction relief based on trial counsel's failure to raise a violation of the Vienna Convention. In doing so, the Court acknowledged the defense counsel's argument that trial counsel failed to meet the capital defense requirements set forth in the ABA Guidelines. Although the Court recognized "the utility of guidelines for effective capital counsel," the Court stated that without an adequate showing of prejudice, "we will not find that capital counsel was *per se* ineffective simply because counsel's representation differed from current capital practice customs, even where the differences are significant." *Id.* at 1189.

Commonwealth v. Hall, 872 A.2d 1177, (Pa. 2005) (Saylor, J., dissenting).
Dissenting from a denial of post-conviction relief for ineffective assistance of counsel in the Supreme Court of Pennsylvania, Justice Saylor emphasized the duty of counsel to investigate "relevant mental-health and life-history aspects of mitigation," criticizing the majority for failing to address the question of whether counsel ever in fact did so. *Id.* at 1193 (citing *Wiggins v. Smith*, 539 U.S. 510, 525-26 (2003)). The dissent quotes a reference to the ABA Guidelines used in *Wiggins* the counsel must "discover *all* reasonably available mitigating evidence." *Id.* at 1194 n.3 (citation omitted).

Commonwealth v. Brown, 872 A.2d 1139, (Pa. 2005) (Saylor, J., dissenting).
The Supreme Court of Pennsylvania held that the failure of counsel to investigate evidence of mental impairment to support a theory of manslaughter was insufficient to establish ineffective assistance, as no evidence was on record at the time of trial that might suggest to counsel that further investigation was warranted. *Id.* at 1149.

In a dissenting opinion, Justice Saylor rejected the suggestion that counsel had no responsibility to investigate potential mental illness issues and instead expounded on the duty of counsel to take the initiative in investigation, even in the face of an absence of evidence. Justice Saylor cited to ABA Guidelines to demonstrate the near-ubiquity of mental health issues in the criminal justice system, noting that the performance of "a thorough mental-health investigation is a pillar of the American Bar Association's guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." *Id.* at 1173.

Presley v. State, 2005 Ala. Crim. App. LEXIS 52 (Feb. 25, 2005).
The Court of Criminal Appeals of Alabama reversed the summary dismissal of Presley's appeal for relief from his capital murder conviction and sentence of death. The court held that due process was violated when the lower circuit court failed to serve petitioner's counsel with a copy of orders filed in the case and subsequently summarily dismissed the case.

The Court of Criminal Appeals noted that another reason for its decision was that Presley raised claims of ineffective assistance of counsel at the penalty phase—claims that required further investigation rather than a summary dismissal. Presley alleged that trial counsel conducted no investigation into his history and upbringing, and had such investigation been done, counsel would have discovered a troubled background, including sexual and physical abuse, drug and alcohol abuse, and extreme poverty. The court further noted that the trial record "reflect[ed] that counsel presented no

evidence at the sentencing hearing and that he argued at closing that only one mitigating circumstance applied—that Presley was 16 years old at the time of the crime." *Id*. at *19. The court cited *Wiggins v. Smith*, 539 U.S. 510 (2003), for its standard on deficient performance based on counsel's failure to investigate and present evidence of Wiggins' background and difficult life history:

> The [Supreme] Court noted that it had previously referred to the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we have long referred as guides to determining what is reasonable. Noting that the ABA guidelines provide that counsel should attempt to discover '*all reasonably available* mitigating evidence,' the [Supreme] Court found that counsel's review of only social services records and the presentence investigation report and the failure to pursue additional information was unreasonable.

Presley, 2005 Ala. Crim. App. LEXIS 52 at *21, citing *Wiggins v. Smith*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added in *Wiggins*).

Commonwealth v. Williams, 863 A.2d 505 (Pa. 2004) (Saylor, J., dissenting). The Supreme Court of Pennsylvania examined a number of claims for post-conviction relief presented by Williams, among them ineffective assistance of counsel, prosecutorial misconduct, and various due process violations. The Court held that none of the claims merited relief.

Justice Saylor dissented, arguing that Williams had established ineffective assistance of counsel at the penalty phase, primarily for failing to develop adequate mitigating evidence. Citing a reference to the ABA Guidelines in *Wiggins v. Smith*, 539 U.S. 510 (2003), the opinion recognized defense counsel's "obligation to 'discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Williams*, 863 A.2d at 527 (citation omitted). Justice Saylor drew upon substantial support from the ABA guidelines throughout his opinion, commenting that "[I]n my view, the drafters' claim that the Guidelines "embody the current consensus about what is required to provide effective defense representation in capital cases" is not an exaggerated one. *Id*. at 527 n.6 (citation omitted).

The dissent pointed to a number of instances in which the conduct of defense counsel fell short of professional standards. Justice Saylor utilized the Guidelines in arguing that counsel was irresponsible in scheduling his first meeting with the defendant only one week before trial, *id.* at 528 n.7, that "competent counsel would have reviewed records from Appellant's other criminal proceedings," *id*. at 528, that a previous psychotic episode merited professional evaluation, *id*. at 528 n.8, and that counsel was unjustified in relying on his own opinion of the defendant's psychological state, *id*. at 528 n.9. More broadly, the Guidelines were cited to rebut counsel's suggestion that the defendant's adamant commitment to fighting the validity of his conviction excused a lack of penalty phase preparation. *Id.* at 531 n.17, n.19.

The dissent criticized the majority for too lightly disregarding "the potency of life-history and mental-health mitigation in terms of capital sentencing," claiming that such an approach is contrary to Supreme Court precedent and the ABA guidelines. *Williams*,

863 A.2d at 533 (citation omitted). Justice Saylor explained his perspective on the role of mitigating evidence in the sentence process, quoting the Guidelines: "None of this evidence should be offered as a counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer[.]" *Id.* at 534, n.22 (citation omitted). Indeed, psychological evidence of the type at issue here would "provide some sort of explanation for Simmons's abhorrent behavior." *Id.* at 543, n.23 (relying on the ABA Guidelines to support this contention)..

Justice Nigro filed a separate dissent, agreeing with Justice Saylor that the defendant received ineffective assistance of counsel in the penalty phase. *Williams*, 863 A.2d at 524.

Harris v. State, 947 So. 2d. 1079 (Ala. Crim. App. 2004), *rev'd on other grounds*, *Ex Parte Jenkins*, 2005 Ala. LEXIS 49 (Ala. Apr. 8, 2005).
The Court of Criminal Appeals of Alabama found that Harris's trial counsel (who had previously never represented a defendant in a capital case) was ineffective during the penalty phase of the trial. Trial counsel did not offer evidence of the abuse Ms. Harris suffered in her three marriages, including at the hand of the man she was convicted of killing in this case. The court cited to *Wiggins v. Smith*, 539 U.S. 510 (2003), in its analysis of counsel's effectiveness and noted that "any reasonably competent attorney would have realized that pursuing these leads [the available mitigating evidence about Ms. Harris' troubled past] was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." *Harris,* 2004 WL 2418073, *43 (citations omitted).

In finding counsel's performance deficient, the court stated that "Harris has affirmatively shown … that there was a wealth of mitigating evidence readily available to counsel that counsel should have investigated before it can be said that counsel's strategy for the penalty phase was a reasonable strategic choice. In other words, counsel made their decision while uninformed as to 'the overall character' of potential witnesses testimony." *Id.* (citations omitted). *Id.* at *44.

In its discussion of the ABA Guidelines, the court noted that "[a]s the United States Supreme Court explained in *Wiggins*, the value of counsel's 'strategic' decision depends on 'the adequacy of the investigations supporting [that] judgment.' *Id.* at *42 (citations omitted). The court then quoted from the *Wiggins* opinion's language on the ABA Guidelines.

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as 'guides to determining what is reasonable.' (Citations omitted). The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. id., 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior

> adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 ('The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing ... Investigation is essential to fulfillment of these functions').

Harris, 2004 WL 2418073, *42 (quoting *Wiggins*, 539 U.S. at 524-25.)

"[T]he record reveals that before the penalty phase of the trial counsel had before them documents, notations, information from family and friends that, if pursued, would have led to the discovery of statutory and nonstatutory mitigating evidence. In summary, it was disclosed at the hearing on the Rule 32, Ala. R. Crim. P., petition that [a number of important] facts were readily discoverable for presentation as mitigating evidence. … [C]ounsel had before them many clues suggesting that Harris's troubled past, yet they declined to investigate those clues for possible use in the penalty phase. Instead, counsel relied on only the sparse testimony of character witnesses, who, while adequately painting a picture of Harris as an affable, hard working, Christian woman, completely failed to offer any insight into Harris's psyche or the very difficult life Harris had experienced." *Id.* at *43.

In re Larry Douglas Lucas*,* 94 P.3d 477 (Cal. 2004).
The California Supreme Court found that defense counsel's failure to conduct an adequate investigation of available mitigating evidence for possible use at penalty trial was ineffective assistance of counsel. Trial counsel's

> failure to investigate petitioner's early social history was not consistent with established norms prevailing in California at the time of trial, norms that directed counsel in death penalty cases to conduct a reasonably thorough independent investigation of the defendant's social history--as agreed by respondent's own expert and as reflected in the ABA standards relied upon by the court in the *Wiggins* case. The ABA Guidelines provide that investigation into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence....' Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. *Cf.* [ABA Guidelines] 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, ... *family and social history,* [and] prior ... juvenile correctional experience....)"
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> *Id.* at 503, citing (*Wiggins,* 539 U.S. at 524, 123 S.Ct. at pp. 2536-2537.)

Franks v. State*,* 278 Ga. 246 (2004).
The Supreme Court of Georgia affirmed Franks' conviction and sentence, finding no reversible error in the trial court's decision. The court addressed Mr. Frank's claim that trial counsel's mitigation investigation was inadequate by reviewing *Wiggins v. Smith,* 539 U.S. 510 (2003): "In *Wiggins v. Smith*, the United States Supreme Court measured trial counsel's mitigation investigation against the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The Court described these guidelines as 'well-defined norms' and noted that they have long been considered as appropriate guides to determining the reasonableness of counsel's performance." *Id.* at 147 (citations omitted).

Peterka v. State, 890 So.2d 219, (Fla. 2004).
The Supreme Court of Florida affirmed the trial court's order denying post-conviction relief and denied Peterka's petition for habeas corpus. The Court, discussing a claim of ineffective assistance in the penalty phase, reviewed the standards for the investigation of mitigating evidence established in *Wiggins v. Smith*, 539 U.S. 510 (2003):

> [E]fforts should be made to discover available mitigating evidence and evidence to rebut any aggravating evidence from such sources as "medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influence." *Id.* at 223, 123 S.Ct. 2527 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, at 133 (1989)).

890 So.2d 219, 236. The Court determined that counsel's investigation of mitigating circumstances had been adequate and that the failure to present certain mitigating elements was a legitimate strategic decision. *Id*.

Armstrong v. State*,* 862 So.2d 705 (Fla. 2003).
The Supreme Court of Florida ordered a new penalty phase proceeding as the result of the introduction of a vacated prior conviction. Judge Anstead wrote a concurring opinion focusing on Armstrong's claim of ineffective assistance of counsel during the penalty phase. He first reviewed the standards for the investigation of mitigation evidence set forth by the Supreme Court in *Wiggins* and then compared the performance of Armstrong's counsel with that of counsel in *Wiggins*:

> The 1989 ABA Guidelines that the Supreme Court concluded should have guided counsel's investigation in *Wiggins* should have provided similar guidance to Armstrong's counsel. These standards underscore not only the importance of defense counsel's investigation into mitigating factors, but also the understanding that often strategy shifts between the penalty and guilt phases of a capital trial. In general, preparation for both the penalty and guilt phases is essential, and counsel should be aware that "the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases." 1989 ABA Guidelines 11.8.1, at 123. "If inconsistencies between the guilt/innocence and the penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics." 1989 ABA Guidelines 11.7.1(B), at 115. In conducting the investigation into those individuals who might present testimony at the penalty phase, counsel is required to seek out witnesses who are "familiar with aspects of the client's life history that might affect ... possible mitigating reasons for the offense(s), and/or mitigating evidence to show why the client should not be sentenced to death." *Id.* 11.4.1(D)(3)(B), at 95.

862 So.2d at 723. He also cited to Guideline commentary, which explained the unique nature of sentencing proceedings in capital cases. Judge Anstead concluded that defense counsel's investigation into mitigation was inadequate because it failed to discover the quantity and quality of evidence that actually existed.

Zebroski v. State, 822 A.2d 1038 (Del. 2003).
The Supreme Court of Delaware affirmed a denial of post-conviction relief for ineffective assistance of counsel. Among Zebroski's claims was that the appointment of a single defense counsel constituted ineffective assistance. *Id.* at 1045. Justice Steele, writing for the court, acknowledged that a trial may be "fundamentally unfair" if the defendant lacks "access to the raw materials integral to the building of an effective defense." *Id.* at 1045 (citing *Ake v. Oklahoma,* 470 U.S. 68, *77* (1985)). The Court further explained:

> We also recognize that the American Bar Association recommends that each capital defendant possess a "lead counsel" who assembles a defense team with (a) at least one mitigation specialist and one fact investigator; (b) at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and (c) any other members needed to provide high quality legal representation.

822 A.2d at 1046 (citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.4--The Defense Team (Revised ed., Feb. 2003).

The Court agreed that such a defense team was desirable when feasible and that a "lack of proper staffing" might properly be weighed as a factor in claims of ineffective assistance. *Id*. However, the Court found that the lone counsel passed the standard of reasonableness, noting his reliance on assistance from Public Defender's Office staff and his utilization of an outside psychologist. 822 A2d at 1046.